

# **EXHIBIT D**

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

-----

Fair Isaac Corporation,	)	
a Delaware Corporation,	)	File No. 16-cv-1054 (DTS)
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Federal Insurance Company,	)	Courtroom 14W
an Indiana corporation,	)	Minneapolis, Minnesota
and ACE American Insurance	)	Friday, February 24, 2023
Company, a Pennsylvania	)	9:00 a.m.
Corporation,	)	
	)	
Defendants.	)	
	)	

-----

BEFORE THE HONORABLE DAVID T. SCHULTZ  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

**(JURY TRIAL PROCEEDINGS - VOLUME V)**

Proceedings recorded by mechanical stenography;  
transcript produced by computer.

\* \* \*

APPEARANCES:

For Plaintiff:

MERCHANT & GOULD P.C.  
BY: ALLEN W. HINDERAKER  
HEATHER J. KLIEBENSTEIN  
PAIGE S. STRADLEY  
MICHAEL A. ERBELE  
JOSEPH W. DUBIS  
GABRIELLE L. KIEFER  
150 South Fifth Street, #2200  
Minneapolis, Minnesota 55402

For Defendants:

FREDRIKSON & BYRON  
BY: TERRENCE J. FLEMING  
LEAH C. JANUS  
CHRISTOPHER D. PHAM  
RYAN C. YOUNG  
PANHIA VANG  
200 South Sixth Street, #4000  
Minneapolis, Minnesota 55402

O'MELVENY &amp; MYERS LLP

BY: LEAH GODESKY  
ANTON METLITSKY  
DARYN E. RUSH  
ROXANA GUIDERO  
Times Square Tower  
7 Times Square  
New York, New York 10036

Court Reporters:

RENEE A. ROGGE, RMR-CRR  
KRISTINE MOUSSEAU, CRR-RPR  
MARIA V. WEINBECK, RMR-FCRR  
PAULA RICHTER, RMR-CRR-CRC  
United States District Courthouse  
300 South Fourth Street, Box 1005  
Minneapolis, Minnesota 55415

\* \* \*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

PAGE

**LAWRENCE WACHS VIA DEPOSITION**

Examination By Ms. Janus	739
Examination By Mr. Hinderaker	806

**THOMAS CARRETTA**

Direct Examination By Mr. Hinderaker	843
Cross-Examination By Ms. Godesky	892
Redirect Examination By Mr. Hinderaker	934

DEFENDANTS' EXHIBITS

REC'D

4	921
17	947
282	945
304	918

1 9:00 A.M.

2  
3 (In open court with the Jury present.)

4 THE COURT: Good morning. Please be seated go  
5 ahead and be seated.

6 All right. Good morning, Members of the Jury.  
7 Thanks, everyone, for making it in here. I don't know how  
8 bad your commutes were, but thanks for making it.

9 Mr. Hinderaker, are you ready to proceed?

10 MR. HINDERAKER: We are, Your Honor.

11 THE COURT: All right. Why don't you, you need to  
12 explain what's going on now?

13 MR. HINDERAKER: I do. I do.

14 THE COURT: Go right ahead.

15 MR. HINDERAKER: Our first witness this morning is  
16 a gentleman by the name of Larry Wachs, Lawrence Wachs, and  
17 he will be showing -- his testimony will be presented by  
18 video, so I will read this introduction about him.

19 Lawrence Wachs is a former FICO employee, now  
20 living in New York, whose deposition was taken February 26,  
21 2019. His role was in sales; and when he left FICO, his  
22 title was sales executive. He was with FICO from 2006 to  
23 2008.

24 Mr. Wachs' deposition was taken by Leah Janus, one  
25 of the counsel for defendants. There may be another voice

1 on the video and, if so, that will be mine.

2 THE COURT: Thank you, Mr. Hinderaker. Go ahead.

3 (LAWRENCE WACHS)

4 EXAMINATION

5 BY MS. JANUS:

6 Q. Please state your name for the record?

7 A. My name is Lawrence Wachs.

8 Q. Are you represented by counsel for FICO here today?

9 A. I am.

10 Q. I want to start just with a little bit of background  
11 information. Where, where did you receive your education  
12 and tell us what degrees you obtained.

13 A. I obtained a degree, bachelor of arts degree with a  
14 major in economics from Brooklyn College in 1968.

15 Q. In what year were you born?

16 A. 1947.

17 Q. Are you currently employed?

18 A. No.

19 Q. What was your last -- most recent employment?

20 A. IBM corporation in sales.

21 Q. And what were the years that you were employed for IBM?

22 A. 2009 through 2016.

23 Q. What was your position with IBM?

24 A. Sales.

25 Q. What types of, what type of sales?

1 A. Large programs, technology sales, software sales.

2 Q. Okay. Prior to IBM, what was your employment?

3 A. Fair Isaac. Fair Isaac.

4 Q. What were your years of employment with Fair Isaac?

5 A. 2006 to 2008.

6 Q. What was your position with Fair Isaac?

7 A. Technology sales.

8 Q. Did you have a title?

9 A. Sales executive, sales executive.

10 Q. Prior to your position at FICO, what was your  
11 employment?

12 A. Prior to fair -- FICO, I was employed by RulesPower, a  
13 technology start-up corporation.

14 Q. What were the years of that employment?

15 A. I'm not sure offhand, but it was ending in 2006,  
16 probably beginning in 2005.

17 Q. And what was your position with -- what was it? Can you  
18 repeat the name?

19 A. RulesPower, one word.

20 Q. What was your position with RulesPower?

21 A. Technology sales.

22 Q. So from 1995 through 2016, you were in the technology  
23 sales industry as a --

24 A. That's correct.

25 Q. -- sales executive?

1 A. Exactly right.

2 Q. Okay. Let's focus in then on the 2006 to 2008 time  
3 period when you were employed with Fair Isaac. Do you  
4 recall the month in 2006 that you began your employment with  
5 Fair Isaac?

6 A. Not specifically, no.

7 Q. We'll look at some documents, but it looks like you were  
8 there in the beginning of the year 2006, does that --

9 A. That's correct.

10 Q. Okay. So you started in the beginning of 2006. And  
11 when you began at Fair Isaac, what was your title?

12 A. Sales executive.

13 Q. Okay. What, what did your position involve as a sales  
14 executive?

15 A. Locating organizations that could take advantage of the  
16 FICO software in order to achieve business benefit.

17 COURT REPORTER: How do you spell FICO?

18 MS. JANUS: F-I-C-O.

19 COURT REPORTER: Got it.

20 BY MS. JANUS:

21 Q. Were you familiar with the software at FICO prior to  
22 beginning your work with them?

23 A. Yes.

24 Q. And how was that?

25 A. The RulesPower software was comparable in its



1 functionality and in fact, it's a matter record, I believe,  
2 that the software at FICO was actually the RulesPower  
3 software when FICO acquired the assets of RulesPower.

4 Q. Was there a particular software that you were focused on  
5 selling during your time at FICO?

6 A. Yes.

7 Q. What was that?

8 A. The name of the software was Blaze Advisor, and it was a  
9 decision management rules processing application.

10 Q. Who did you work with while you were at FICO?

11 A. I reported directly to a gentleman named John Haines,  
12 H-A-I-N-E-S.

13 Q. What was his position?

14 A. Manager of sales for Blaze Advisor for the northeast.

15 Q. Once the client selected Fair Isaac as a vendor, what  
16 was your role, if any, in the deal going forward?

17 A. Once we were advised that we were the selected vendor,  
18 we would communicate the salient facts about the sale to our  
19 contract administration process, who would have to render a  
20 contract that would be appropriate for the deal, reflective  
21 of the terms of the deal, including the price. I would work  
22 with senior management in establishing what that price would  
23 be, which is part of the selection process, but assuming  
24 that they've selected us already, we were already past that  
25 approval stage.

1 Q. So establishing the price is something you would work  
2 with senior management at Fair Isaac?

3 A. That's correct, which would include John Haines, who I  
4 mentioned before and his superiors.

5 Q. Do you remember who else was involved in that process  
6 other than John Haines?

7 A. John Haines reported to Bill Waid, W-A-I-D.

8 Q. Were you involved in the negotiation of the contract --  
9 and we're speaking here in general about your  
10 responsibilities there. We'll get to Chubb specifically.  
11 But, in general, would you be involved on some level with  
12 the contract negotiation process?

13 A. I would generally facilitate in the specific case of  
14 what I would call the Chubb or Federal, Chubb & Son, Inc.,  
15 there was a vendor manager at Chubb, and there was a  
16 contract person at FICO, and the two would need to work  
17 things out, and I would stay within that process to  
18 facilitate to make sure that all of the business issues were  
19 at least conformed between the two parties.

20 Q. Okay.

21 A. Not necessarily the legal issues.

22 Q. Mm-hmm. Mm-hmm. What did you do to prepare for your  
23 deposition today?

24 A. I met with Mr. Woodward and Mr. Hinderaker yesterday in  
25 these offices.

1 Q. And without talking about the substance of your  
2 communications, did you do anything else other than meeting  
3 with Mr. Hinderaker and Mr. Woodward?

4 A. No.

5 Q. Did you review any documents during your meeting with  
6 Mr. Hinderaker and Mr. Woodward?

7 A. Yes.

8 Q. What documents did you review?

9 A. I would assume the documents that were part of the  
10 discovery process.

11 Q. And so were there e-mails that you reviewed?

12 A. There were some e-mails, I believe, as part of that  
13 process.

14 Q. How long did you meet with Mr. Hinderaker and  
15 Mr. Woodward?

16 A. Approximately three hours, three to four hours.

17 Q. Okay. When did you first become involved in the Chubb  
18 account?

19 A. Early 2006.

20 Q. What is your recollection of how you became involved?

21 A. I was referred to the account by our sales, in-house  
22 sales intake person, who received a request for information.

23 Q. At the time you became involved in early 2006, was Chubb  
24 an existing client of FICO's?

25 A. Not that I know of.

1 Q. Okay. So this is something where they were approaching  
2 FICO to possibly become a client?

3 A. Yes.

4 Q. Okay. And what do you recall about what took place then  
5 when you first became involved?

6 A. We required -- to communicate our intention to bid -- to  
7 respond to the RFI and were given a deadline, which was  
8 probably within two weeks of our receipt of the document in  
9 order to respond.

10 Q. When you say, "respond to the RFI," what do you mean?

11 A. There were specific questions dealing with the  
12 appropriateness of the software and of FICO to be able to  
13 respond, typical things would be references and just general  
14 capabilities, and that would have to be submitted to the  
15 client and then responded to and then determined whether we  
16 would be qualified for the short list.

17 Q. And those are questions issued by Chubb?

18 A. That's correct.

19 Q. Okay. What did you understand that Chubb was looking  
20 for? For someone who is not in your industry, how would you  
21 describe this?

22 A. They were looking for a product that would enable them  
23 to satisfy their business requirements, which included being  
24 able to penetrate new markets, down -- downscaling their  
25 product in this division to a more small to medium-sized

1 business marketplace and potentially to retail.

2 And they recognized that with a higher volume of  
3 input business on their part that they did not have a  
4 scaleable solution and that it would require numerous more  
5 underwriters to approve the business -- require numerous  
6 more underwriters to approve the business and to understand  
7 the risk of the business, and they were looking for an  
8 automation product that would assist them in that.

9 Q. And the automation product -- one automation product  
10 would have been Blaze; is that correct?

11 A. Yes. The automation product is in a platform that is  
12 not industry specific or solution specific. It's not an  
13 out-of-the-box solution. It would have to be crafted to  
14 respond to the specific needs of any given client.

15 Q. Well -- and tell me what is -- how would you describe  
16 Blaze's then role in that process?

17 A. It's a rules engine, which is a place or a repository  
18 where the sum of all of the rules that are necessary to make  
19 decisions on an automated decision management basis are  
20 kept, and it's a way for people who are nontechnical to be  
21 able to make changes to those rules and in effect to get new  
22 outcomes in the decisions as a result of those changes.

23 And recognizing that capability, their secondary  
24 desire was to be able to have the business people directly  
25 craft changes, both on a production basis, but perhaps just

1 as importantly on a modeling basis, so they could do what-if  
2 scenarios. For example, if we changed the threshold for  
3 approval on size or number of claims or various client  
4 attributes, what would the new effect be, and they could do  
5 that on a modeled basis rather than empirically, and that  
6 was a tremendous business advantage to them since in order  
7 to do that in the current state at that time would require  
8 large lead times, lead times as a result of both the queue  
9 in developing the software by IT and then the actual  
10 programming in the existing state of the art, whereas, with  
11 the rules engine, this could be done by business people in  
12 days, not months or years.

13 Q. And when you say "business people," you're referring to  
14 business people at Chubb?

15 A. That's right. The underwriting managers.

16 Q. Who were your contacts during the initial conversations  
17 with Chubb?

18 A. Initial conversations with Sully, S-U-L-L-Y, and I  
19 believe his name was John Sullivan. I'm --

20 Q. Could it have been Patrick?

21 A. Patrick Sullivan, yes. I'm sorry. John Sullivan was a  
22 fighter.

23 Q. Patrick -- so Sully, and he goes by Sully, right?

24 A. That's correct.

25 Q. Okay. And he was at Chubb?

1 A. That's right. He was the primary gatekeeper. He had  
2 the business clients' requirements, and he was tasked with  
3 the responsibility of making certain that the software would  
4 be appropriate and that the value would be there for the  
5 software -- the value would be there with the software.

6 Q. And so was it you and Sully who were the main people who  
7 were involved in these early discussions on Blaze?

8 A. On the FICO side I also worked closely with Russ  
9 Schreiber, who was the -- S-C-H-R-E-I-B-E-R -- who was the  
10 insurance specialist at FICO, so that myself, representing  
11 the technology, and Russ Schreiber, representing the  
12 business acumen, together we formed an alliance that helped  
13 convince the client that our software was the best  
14 available.

15 Q. So from FICO's side, you and Russ Schreiber were the  
16 primarily sales team, correct?

17 A. Yes.

18 Q. From Chubb's side, Sully was the primary contact, and  
19 anyone else at Chubb that you recall dealing with?

20 A. The name Owen Williams comes up, but he entered probably  
21 at the time of software licensing. I don't believe he was  
22 involved before then in the selection process. He was  
23 tasked by Chubb with the responsibility to make certain that  
24 the software was delivered on time and appropriate for  
25 business needs.

1 Q. During the selection process what -- how would you  
2 characterize the frequency of your contact with Chubb, and  
3 were you meeting with them, having phone calls? Tell us how  
4 that went, as far as you recall.

5 A. Shortly after the submission of the response to the  
6 request for information, Russ Schreiber and I visited with  
7 the client and the client technical team in Simsbury,  
8 Connecticut, Simsbury, and responded to their ad hoc  
9 questions about the software and its appropriateness and  
10 who, who -- references, things like that, expanding on the  
11 response for information.

12 Q. Okay. And was that the only in-person meeting you had  
13 during this process?

14 A. Actually we were at that point waiting for the client to  
15 make the short list, to make the short list available; and  
16 when we were informed that we were on the short list, we  
17 were meeting with the client probably every week to ten  
18 days.

19 Q. And that was in Connecticut or --

20 A. First in Connecticut and then in Warren, New Jersey.

21 Q. What -- what were the conversations you were having  
22 with -- was it just Sully you were meeting with?

23 A. There was a team of people. Sully was the primary  
24 driving force. I don't remember --

25 Q. Do you -- okay. Okay.



1 A. -- any of the other names.

2 Q. And was it just you and Russ who were attending the  
3 meetings from FICO's side?

4 A. At the response, there was one large meeting and  
5 Schreiber's boss, Mike Gordon, was in attendance at that  
6 meeting as well, just the three of us, though -- I'm sorry.  
7 And Mr. Zwizinski, who was a technical consultant for FICO.

8 Q. Back to my question. What were the topics of  
9 discussions during these meetings?

10 A. We first built a proof of concept based upon some sample  
11 rules that the client gave us, and so we were able to  
12 demonstrate how the product would work and how they would  
13 work the product and build the solution. And then the  
14 conversation evolved into a commercial conversation about  
15 the cost of the software and our collection discovery, if  
16 you will, on the type of usage, number of transactions, the  
17 number of rules, which are all determinants on a micro-level  
18 for determining the pricing of the software, as well as our  
19 investigation of the corporate financials of the client, if  
20 you will, so that we could determine the revenue of the  
21 client and determine the -- on a macro-level what our  
22 pricing would be, since both ingredients would go into our  
23 final pricing.

24 Q. Okay. Let's start with the, the micro-level you  
25 mentioned. What were the considerations that you said go

into the micro-level?

A. A description of the application and the scope, the number of decisions that would have to be made, the number of seats of developers who would actually utilize the software to build and manage the software over time, the geography, where it would be utilized and, if I didn't say, the number of rules that were assumed would be required.

Q. Is that the same as the number of decisions or --

A. Interestingly, so a single rule doesn't make a decision. There are multiple rule sets that go into making a decision. So if you kind of wanted to be able to, you know, both of you could.

Q. So "description of the application and scope," what do you mean by "the application"?

A. The usage of the software once it's in production. So that could include -- when I say "scope," that could include, again, the number of users who would be utilizing the software, the number of policy requests and then, finally, the number of different application areas, and in this case only one application area was specified and that was the underwriting group for this renewal process.

Q. And this was in the early, early discussions?

A. That's right.

Q. Okay. So there was one application at issue here. And the number of decisions, what does that refer to, generally?

1 A. If we were looking at a particular policy, we would want  
2 to know what the business has to tell us, the attributes  
3 that we would have to look at at the policy submission  
4 stage, again, the name of the client, the business  
5 relationship of that client to -- of their client to them,  
6 the number of claims that they have had in the past, the  
7 size of the policy that was being written. All of the  
8 factors that a traditional underwriter would look at in  
9 determining the risk-reward ratio and what their pricing  
10 would be for the premium for that policy. Those are the  
11 decisions. There may be ten decisions, but there might be  
12 100 rules or more that would go into those decisions.

13 Q. Mm-hmm. The number of seats of developers to build?

14 A. Yes.

15 Q. Does that refer to seats at Chubb?

16 A. The number of developers utilizing the software on an  
17 ongoing basis. Again, we didn't know at that time whether  
18 the client would want FICO to build the software as a  
19 services, professional services, so we would contemplate how  
20 many seats of developer license would be required --

21 Of developer license.

22 COURT REPORTER: Would be required?

23 THE WITNESS: Yes.

24 BY MS. JANUS:

25 Q. And then the number of rules you alluded to earlier, but

1 can you just describe what you mean by "the number of  
2 rules"?

3 A. Discreet, if/then statements. If the client is located  
4 in this geographic, then we're talking about Chubb's client  
5 at this point; but if the client were located in this  
6 geography and he had a prior number of claims, each one of  
7 those would be -- if the client is in this geography, then  
8 the client is something and then you would have to cascade  
9 those rules together to make that informed decision, but at  
10 this point in the conversation, having not done original  
11 discovery of the client's actual processes, those kind of  
12 microelements are less important than the macroelements of  
13 size and scope.

14 Q. Mm-hmm. In terms of the pricing --

15 A. That's right.

16 Q. -- decision?

17 A. Right.

18 Q. And then you mentioned another microelement was  
19 geography, where utilized?

20 A. That's right.

21 Q. What are you referring to with that?

22 A. In broad terms, it would be United States or global.

23 Q. Mm-hmm. And how would these micro factors actually be  
24 used to develop a price?

25 A. We would submit the statistics, for example, annual

1 revenue by division, if it were available, specific to this  
2 application within a particular division. I would give that  
3 to John Haines, and he would communicate with Bill Waid.  
4 The first break would be, Is it a small, medium or large  
5 application; and based upon that, the pricing assumptions  
6 would be made and then perhaps it would be a percentage of  
7 revenue would be the cost of the software.

8 Q. Mm-hmm. What do you mean based on that, "pricing  
9 assumptions would be made"?

10 A. Based upon the dollar value of the revenue, on an annual  
11 basis, we would take a percentage of that and that might be  
12 the price.

13 Q. So you take a percentage of Chubb's --

14 A. Revenue.

15 Q. -- revenue to determine the price?

16 A. Of the software.

17 Q. Okay. And, and so how do the micro factors that you --  
18 because you -- you described the revenue --

19 A. Right.

20 Q. -- the corporate finances of the client as the macro  
21 sort of considerations for pricing. How do the micro  
22 considerations that you described factor into the price  
23 determination?

24 A. The micro would be small, medium and large.

25 Q. Okay.

1 A. And then based upon small, medium and large, we would  
2 apply the appropriate percentage. If there were, for  
3 example, argumentatively, a ubiquitous software solution  
4 like accounts payable where thousands of people at Chubb,  
5 that would be a large product and it would be a different  
6 pricing percentage of the revenue than a small product.  
7 Frankly, a lot of this was management's decision.

8 Q. Mm-hmm (Yes).

9 A. And I -- at FICO.

10 Q. Were discounts regularly applied by FICO in determining  
11 final prices?

12 A. I would argue that perhaps -- in the customer journey of  
13 FICO selling to Chubb, I would argue that we have a  
14 progression. We would like to sell an application,  
15 transactional, and prove the value of the software and then  
16 perhaps sell a second application or a third application and  
17 then perhaps a change of geography from United States only  
18 to global, for example.

19 And that progression enables you to sell with more  
20 value than if you -- without any proof of product capability  
21 were to, for example, start off with -- excuse me -- an  
22 enterprise license. So as a salesman in the field, you  
23 always want to do this transactional level pricing. So I  
24 would argue -- to answer the specific question -- that as a  
25 first transaction with a new customer with a lot of

1 potential, a lot of needs for automation, that we would want  
2 to discount as low as we could go on a first pricing basis.

3 COURT REPORTER: On what?

4 THE WITNESS: -- on a first pricing basis and then  
5 build value and probably charge additional fees as we are  
6 progressing.

7 BY MS. JANUS:

8 Q. Throughout that process of building value and continuing  
9 to sell, were discounts a part of FICO's internal pricing  
10 models?

11 A. I would tell you that discounts are exceptional, and  
12 they're X of a pricing model.

13 COURT REPORTER: And they're what?

14 THE WITNESS: X, separate from a pricing model.

15 BY MS. JANUS:

16 Q. Okay. And what do you recall about the conversations  
17 that you had with Chubb relating to the enterprise deal and  
18 what Chubb wanted out of the enterprise deal?

19 A. I don't remember anything specific. I believe that -- I  
20 don't have any recollection of what, what was specifically  
21 drove that other than our desire to continue to sell into  
22 the account and there seeing the appropriateness of the  
23 software and being able to see where they would want to  
24 expand beyond the single, that first transaction, but I  
25 don't know the dates involved.

1 Q. Sure. Do you recall discussing that geography factor  
2 that you mentioned, the geographical scope of the enterprise  
3 license?

4 A. I do recall the folks at Chubb did request us to look at  
5 the cost of extending the license agreement beyond  
6 territorial United States.

7 Q. Do you recall when that was?

8 A. Part of the same -- before the product license agreement  
9 was signed was the first request, first time.

10 Q. Okay. And do you recall what the outcome of that  
11 discussion was?

12 A. We did not -- we priced it, and the client was not  
13 interested at that time.

14 Q. And you think that was prior to the initial license  
15 agreement being entered into in June of 2006?

16 A. Yes.

17 Q. Do you recall actually having an oral conversation with  
18 anyone at Chubb about that topic?

19 A. Certainly, both Sully and Jim Black.

20 Q. When did you discuss that with Sully?

21 A. I don't remember the time frame.

22 Q. Do you think it was before or after the June 2006  
23 license agreement was entered into?

24 A. There were multiple conversations, but the initial one  
25 was prior to the execution of the license.



1 Q. Okay. But you recall interacting with Sully on this  
2 issue?

3 A. There was a request made to find out how much it  
4 would -- additional it would cost to have a global license,  
5 and I would have certainly responded to that request and  
6 the -- Chubb did not undertake any action at that time.

7 Q. Do you think that generally a response from you about  
8 how much it would cost to do a global license would -- you  
9 would expect that to be an e-mail?

10 A. It should have been some written response, I would  
11 assume, but, again, I have no specific recollection.

12 Q. Okay.

13 A. I would say, though, that the scope of the original RFI,  
14 as I remember it, was U. S. domestic only.

15 COURT REPORTER: Was?

16 THE WITNESS: U. S. domestic only.

17 BY MS. JANUS:

18 Q. That is the RFI you were responding to in early 2006?

19 A. That's correct.

20 Q. Okay. And then at some point during the commercial  
21 phase of the conversations, the concept of a global license  
22 entered the picture, correct?

23 A. As I remember the situation, and specifically there was  
24 some thought that as the software was being built  
25 appropriately for the review of incoming contract requested

1 claim applications for license -- for software -- excuse  
2 me -- for premium and for acceptance by the underwriting  
3 staff, there was a feeling that the software that was being  
4 developed would apply to the European business as well, and  
5 they wanted to be able to take advantage of that.

6 Q. "They" being Chubb?

7 A. Yes.

8 Q. Did you learn about that during the meetings you were  
9 having with Chubb?

10 A. Yes.

11 Q. Okay. What other conversations do you recall having  
12 relating to the geographical scope of the license?

13 A. That was it.

14 Q. Okay.

15 A. The request came in and we responded to the request.  
16 The license was executed, and it did not include the global.

17 Q. The license was executed.

18 A. With just U. S. territory.

19 Q. Have you always had a recollection of the interaction  
20 with Sully that you just described here today?

21 A. I don't understand the question in terms of, have I  
22 always had it. I know that the request came in and we  
23 responded to the request, and it was never acted upon that I  
24 know of during my tenure at FICO, but I can't answer how  
25 long I knew that or if I have always known it.

1 Q. Okay. So you don't know whether that's something you  
2 just recalled recently in connection with preparing for this  
3 deposition or whether that's something that you had as a  
4 recollection since 2006?

5 A. I would say that my memory was refreshed as I reviewed  
6 the contract work yesterday.

7 Q. Okay. So prior to preparing for your deposition, you  
8 did not have a recollection of that interaction with Sully?

9 A. I did not have an awareness. It was certainly something  
10 that I do remember once I did see the documentation  
11 yesterday.

12 Q. Well, I don't want to put words in your mouth, but you  
13 described a process of sort of progressing from a  
14 transaction level commitment to a larger commitment and then  
15 to an enterprise-wide agreement. Do you recall that?

16 A. I recall that, and that was an aspirational statement.  
17 As a salesperson, that is the ideal sales journey. I was  
18 not involved, to my recollection, in the final conversations  
19 extending beyond the original product license agreement.

20 Q. Okay. So are you generally aware that the original  
21 license agreement was entered into in June of 2006?

22 A. Yes.

23 Q. With me so far? Okay. And then there were two  
24 subsequent amendments that were entered into by the parties  
25 later in 2006.

1 A. Yes.

2 Q. Okay. And we'll look at some documents, but do you  
3 recall whether you were involved in those two subsequent  
4 amendments?

5 A. Definitely the first. I'm not sure about the second. I  
6 don't remember.

7 Q. Okay. Are you aware that negotiations took place  
8 relating to the Amendment Two, which was the amendment that  
9 expanded the license to be enterprise-wide?

10 A. I can't tell you then that I was aware of it. I am  
11 aware of it now. And I say that because during the period  
12 in question, Mike Sawyer became the client and principal  
13 with the client, and I moved on to other sales opportunities  
14 beyond Chubb, so I don't know that I was involved in those  
15 conversations at the time.

16 Q. When did that take place?

17 A. I can't tell you that at this point. I have no  
18 recollection.

19 Q. Okay. But sometime in the second part of 2006?

20 A. If that is supported by the contract signings.

21 Q. Okay. As you were engaged in conversations with Chubb  
22 leading up to the June 2006 license agreement, did you place  
23 any significance on what Chubb entity entered into the  
24 license agreement?

25 COURT REPORTER: Sorry, did you place any

1 significance --

2 BY MS. JANUS:

3 Q. On what Chubb entity entered into the license agreement?

4 A. Yes, certainly, because that was a component of the  
5 pricing.

6 Q. And explain what you mean by that.

7 A. Based upon the scope of the usage license would  
8 determine the pricing.

9 Q. And how do you determine that?

10 A. We would ask the client.

11 Q. So you say, "Based on the scope of the usage license" --

12 A. That's right.

13 Q. -- "that would determine the pricing"?

14 A. Yes.

15 Q. Okay. And I want to understand what you mean by that,  
16 especially for someone who is not in your area of expertise.  
17 So -- strike that -- in your area of work.

18 So when you say, "The scope of the usage license,"  
19 what do you mean by that?

20 A. To what geographic location, to what business group, to  
21 what product line, all of those would be components as they  
22 would determine the value of the software to the client and  
23 our product is a value-based price model.

24 Q. My question originally was, Was it significant to you  
25 which Chubb entity entered into the license?

1 A. That's correct. And that was significant to me because  
2 you can draw a straight line between the entity that's --  
3 and its usage within the company. So that would certainly  
4 be an input that Bill Waid would utilize in order to make  
5 his decision as to the price model.

6 Q. And to determine that, you were looking at the  
7 geographic issue, the business group and the product line;  
8 is that correct?

9 A. We had to determine the organizational structure of the  
10 Chubb group of companies, specifically the Chubb & Son,  
11 Inc., servicing arm, to determine where this software  
12 product might find itself and the value that it might give  
13 Chubb, and that would determine and drive the price model.  
14 So, yes, it was important to us to know what the contracting  
15 entity was.

16 Q. And did you go through that process of determining the  
17 organizational structure?

18 A. Not in the detail, other than what would be available  
19 through, for example, the annual report.

20 Q. So you reviewed the annual report in connection with the  
21 negotiation of the 2006 license agreement?

22 A. That's correct.

23 Q. And what did you determine that was significant to the  
24 organizational structure and how the software would be used  
25 from that annual report?

1 A. The answer is, I don't have any recollection of that at  
2 this time.

3 Q. But you do recall reviewing it in connection with  
4 determining how the software would ultimately be used by  
5 Chubb?

6 A. That's correct.

7 Q. And I take it you -- your intent was that you were  
8 negotiating with the Chubb group of companies, is that -- to  
9 use your phrase. Is that fair?

10 A. I don't have recollection now as to what I did then. I  
11 certainly do know what I reviewed yesterday as part of our  
12 preparation, but I do not have any recollection of the  
13 process I undertook 13 years ago.

14 Q. You understood that Chubb was purchasing a license to  
15 use the Blaze software, correct?

16 A. Yes.

17 Q. And that it was purchasing a license to develop  
18 applications using the Blaze software, correct?

19 A. A single application.

20 Q. At the first instance, and then when we get to  
21 enterprise, as many applications as it wanted, correct, for  
22 the license agreement, correct?

23 A. Again, I can't answer that question. At the time I  
24 would be truthful to say that we only knew that it was part  
25 of the Chubb specialty insurance group for which this

1 underwriting effort was directed. So we, again, rated this  
2 as a small application for a small division, if you will, of  
3 the overall companies of Chubb.

4 Q. And that was the initial June 2006 --

5 A. That's correct.

6 Q. -- license agreement?

7 Showing you what has been marked previously as  
8 Deposition Exhibit 106, this is a string of e-mails, the  
9 earliest one of which involves you. Is this one of the  
10 e-mails you reviewed to prepare for your deposition?

11 A. Yes.

12 Q. The e-mail at the bottom of the first page is from you,  
13 dated February 21, 2006, to John Haines and Russ Schreiber,  
14 correct?

15 A. Yes.

16 Q. Subject line is, "Quote, Chubb licensing." So is this  
17 in the beginning stages of the conversations you were having  
18 with Chubb?

19 A. Yes.

20 Q. You say, "John, I brought down the enterprise  
21 (divisional license) to 840,000 based upon the division  
22 sales of 3.5 billion confirmed on their annual report." Do  
23 you see that?

24 A. Yes.

25 Q. Explain what you were referring to in that sentence.



1 A. We were looking at the -- if there were a divisional  
2 license for the use of this group of companies, that it  
3 would be \$840,000 based upon the sales of 3.5 million.  
4 Again, we priced on a macro basis. This particular  
5 license -- and just to describe, .NET and Java are two  
6 different types of program language, if you will, or  
7 operating systems -- that it only pertains to the Chubb  
8 specialty insurance policy application, and therefore it's a  
9 small application, like \$200,000, which was our initial  
10 thought process before it went to Bill Waid.

11 COURT REPORTER: Before it went to?

12 THE WITNESS: Before it went to Bill Waid.

13 BY MS. JANUS:

14 Q. Okay. And so then John -- you send it to John Haines,  
15 who is your supervisor at the time, correct?

16 A. Yes.

17 Q. And then at the top, John Haines forwards the message to  
18 Bill Waid, correct?

19 A. Yes.

20 Q. And he says, "This is standard pricing"?

21 A. He said that to Mr. Waid, yes.

22 Q. Showing you what has been previously marked as  
23 Deposition Exhibit 105, this is an e-mail dated  
24 February 22nd, 2006, from you to Bill Waid, with a copy to  
25 Russ Schreiber and John Haines, correct?

1 A. Yes.

2 Q. Did you review this e-mail in preparation for your  
3 deposition?

4 A. Yes.

5 Q. What are you writing about in this e-mail?

6 A. I'm -- on the date that Bill Waid said in his previous  
7 e-mail that application description was missing, I'm  
8 responding to Bill Waid's question directly, trying to  
9 describe the application requirement and how that will be --  
10 how our product will be used in that division and to the  
11 purpose of getting a pricing decision from Bill Waid.

12 Q. So in connection with describing how the product would  
13 be used in the division, you state, "The division's revenue  
14 is 3.5 billion with 1,000 employees," correct, in the middle  
15 of the first paragraph?

16 A. Correct.

17 Q. Specialty insurance, is that the division you're talking  
18 about?

19 A. That's correct.

20 Q. Okay. Handing you a document that's been marked as  
21 Exhibit 331, this appears to be Bill Waid's response to you  
22 on February 22nd, 2006. Do you see that?

23 A. I do.

24 Q. And he notes, "Approved, but in the future I need more  
25 lead time," correct?

1 A. Correct.

2 COURT REPORTER: More?

3 MS. JANUS: Lead time.

4 THE WITNESS: Correct.

5 BY MS. JANUS:

6 Q. So Bill Waid approved the pricing you suggested for the  
7 application you were discussing?

8 A. Exactly.

9 Q. Okay. Handing you what has been marked as Deposition  
10 Exhibit 332, this is an e-mail from John Haines to Bill  
11 Waid, "Subject: Pricing approval for Chubb ELA," correct?

12 A. Yes.

13 Q. And "ELA" stands for what?

14 A. Enterprise License Agreement.

15 Q. So in the April 2006 time period, was FICO discussing  
16 the terms of an ELA with Chubb?

17 A. Correct.

18 Q. And you were involved in those discussions?

19 A. I wasn't cc'd on this e-mail, carbon copied, so I don't  
20 know that I saw this specifically, but I was involved in the  
21 conversations, yeah.

22 Q. And in the second paragraph of the e-mail, John Haines  
23 says, "Chubb Group of Insurance Companies signed 12.3  
24 billion in policies in 2005," correct?

25 A. Correct.

1 Q. Then he goes on, "And based on that, we used a .24  
2 percent (24 percent of 1 percent) as the basis for the  
3 pricing in the attached," correct?

4 A. Correct.

5 Q. So he is using the revenue information for the Chubb  
6 Group of Insurance Companies in pricing the ELA, correct?

7 A. It appears that way.

8 Q. And then he refers to, "ten dev seats and a 30 percent  
9 volume discount." What is a 30 percent volume discount?

10 A. It's a request by John to have variation pricing, and it  
11 could be based upon -- and I don't know the answer, but  
12 the -- subjectively, it would be either because of the  
13 nature of the business relationship with Chubb, the time of  
14 year, his commission quota or whatever else, that he is  
15 going to reduce that .24 percent of 12.3 billion dollars by  
16 30 percent. He doesn't describe the reason for the  
17 30 percent volume discount.

18 Q. Would a 30 percent volume discount be unusual?

19 A. No.

20 Q. The attachment to the e-mail is a three-page chart. And  
21 you can, if you take the clip off, you can actually spread  
22 it out. It's a little easier to read.

23 So you see towards the top of the page, you're  
24 listed as the account executive, correct?

25 A. That's right.

1 Q. And then Russ Schreiber, consistent with your previous  
2 testimony, is listed as the client partner?

3 A. Correct.

4 Q. And then Dale Zwizinski is the person you've mentioned a  
5 couple of times as the technical person involved?

6 A. Correct.

7 Q. It says, "Note: The following enterprise license  
8 quotation is included at this time for budgetary purposes."

9 Do you know what that means?

10 A. That it wasn't a final quotation. It was just for  
11 estimation purposes.

12 Q. So this was an internal number that was being generated  
13 for purposes of FICO's budget?

14 A. Well, no, because it was sent to Jim Black, James Black.

15 Q. Right.

16 A. So I would tell him that he was looking, without  
17 specificity, he was looking for a range of what this  
18 enterprise license could look like, what the dollars could  
19 be, and that's what we did here. We used the typical  
20 pricing model formula, what would be included in the  
21 enterprise license, and it was our -- it was our expectation  
22 that this would beget a conversation to fine tune the  
23 license points here, and even at that point to negotiate a  
24 higher or lower enterprise license quotation based upon what  
25 they, what they really think they need and what they would

1 achieve.

2 Q. After that statement, it says, "The final quotation is  
3 contingent upon a number of factors, including," and then it  
4 lists six bullet points.

5 A. All of those -- was that the end of your question?

6 Q. Yes.

7 A. All of those bullet points relate to the value of the  
8 software that would be -- that they would license.

9 Q. The third bullet is, "Rate of technology adoption, e.g.  
10 20 applications within five years or in 20 years." Do you  
11 see that?

12 A. Yes.

13 Q. And what is -- what does that relate to?

14 A. It could be the best product in the world; but if the  
15 business units don't choose to adopt it and to fund the  
16 development world, then the value for the client would be  
17 reduced because the product is not being adopted at an  
18 assumed rate.

19 Q. So the rate of adoption may have an impact on the final  
20 price?

21 A. Sure.

22 Q. Or projected rate of adoption?

23 A. It's what we would use to project its impact to the  
24 organization, and you can see in the final paragraph there  
25 we wanted to discover the answers to these questions so that

we could fine tune or enterprise license quotation.

Q. In line 6 of the chart that's below the bullet points, it says, "Enterprise deployment license for Chubb Group of Insurance Companies." Do you see that?

A. I do.

Q. Is that the enterprise license that is being discussed in this e-mail and proposal?

A. Yes.

Q. Showing you what has been marked as Deposition Exhibit 305, this is an e-mail from Jandeen Boone to Jim Black with a copy to you, correct?

A. Yes.

Q. It's dated June 6th, 2006?

A. Yes.

Q. Were you involved in the negotiation of the master services agreement?

A. Yes.

Q. What was the purpose in general terms of the master services agreement?

A. Once the software was acquired, it would have no use to the client unless the software were built for the purpose that it was -- the rules would have to be built, and the software would have to be built out as part of a standard development life cycle. It would have to be unit tested -- project managed, unit tested, client acceptance tested, and

1 there is a process that guarantees that at the conclusion of  
2 the service period that the software could be installed and  
3 become productive, and that would be -- the purpose of the  
4 MSA would be for us to provide our professional services  
5 people to assist them within the scope of work.

6 Q. And when you say, "Our professional people," you're  
7 talking about FICO?

8 A. Yes.

9 Q. Did you refer to them as "professional services" or how  
10 would you --

11 A. I did refer to them now as professional services because  
12 typically that's what the industry calls the technicians  
13 that install the software.

14 Q. Would the FICO professional services folks actually be  
15 working on site with Chubb on the issues you've identified?

16 A. Typically, yes.

17 Q. So FICO was expecting to be closely involved with  
18 Chubb's use of the Blaze software. Is that a fair  
19 statement?

20 A. Yes. Again, as a master services agreement, typically  
21 it's only a vehicle that exists between the organizations  
22 upon which specific work orders are attached that describe  
23 the work effort and the price for that work effort. So the  
24 master services agreement is something that Chubb wanted to  
25 have executed, I believe even before the product license



1 agreement, to make sure that we were compatible.

2 Q. What do you mean by that?

3 A. "Compatible" meaning that we would accept their terms  
4 for an MSA and that we didn't have any untoward terms that  
5 they couldn't live with.

6 Q. And this agreement was related to the software license  
7 agreement?

8 A. It would only be related to the software license  
9 agreement in that it would be that product, that license  
10 product, that we would be talking about here.

11 Q. In the master services agreement?

12 A. That's right.

13 Q. Sure. If you take a look at the master services  
14 agreement that is attached to the e-mail -- actually, before  
15 I get there, you mentioned additional agreements that would  
16 be entered into relating to work that would be performed by  
17 FICO. Are those referred to as statements of work or SOWs?

18 A. The statement of work would drive the work order, yes --

19 Q. Okay.

20 A. -- and the pricing.

21 Q. So just describe to me sort of what documents or  
22 agreements are associated with all these things at FICO.

23 A. Once -- in order to bid and tell the client how much it  
24 would cost to build out the appropriate software, you would  
25 have to sit with the client and create a statement of -- a

1 scope of work, which is the limits, and it enables the  
2 professional services organization to estimate with  
3 precision the number of people hours that would be required  
4 to build the application suitable to purpose.

5 And so there would be an initial discovery session  
6 with the client. That would be a deliverable document, a  
7 discovery document, and then that would drive a statement of  
8 work and the pricing for the statement of work, and those  
9 would become attachments to the master services agreement.

10 Q. And then is there a separate work order?

11 A. I don't know the mechanics in this particular case.  
12 Typically, there would be a work order as an exhibit to  
13 every -- an addendum to each of the -- to the master  
14 services agreement.

15 Q. Okay. All right. So in the e-mail marked as 305,  
16 Ms. Boone says she is attaching the updated version of the  
17 master services agreement and the standard Blaze software  
18 license and maintenance agreement.

19 A. Yes.

20 Q. Do you see that in her e-mail?

21 A. Yes.

22 Q. Okay. Then if you look at the master services  
23 agreement, which is the first document she attaches, on the  
24 first page under the heading "Definitions" --

25 A. Yes.

1 Q. -- do you see that Chubb is defined as "Chubb & Son, a  
2 division of Federal insurance company, for itself and as  
3 servicer for the Chubb Corporations and its non-insurance  
4 company subsidiaries or as manager of its insurance company  
5 subsidiaries"? Do you see that?

6 A. Yes, I do.

7 Q. And did you place any significance on that definition of  
8 Chubb in the master services agreement?

9 A. I did not place any significance on it. I assumed that  
10 was the requested definition of the client.

11 Q. From your perspective, you were entering into a  
12 license -- FICO was entering into a license agreement with  
13 the Chubb group of entities. Is that a fair statement?

14 A. I believe that the client definition as contained in  
15 this paragraph was what we were entering into. Again,  
16 typically, again, our pricing model is based upon the scope  
17 of who the contract entity is --

18 COURT REPORTER: The model is based upon the  
19 scope?

20 THE WITNESS: Yes, the scope, which is based  
21 upon -- which drives the pricing model. I would not  
22 typically get -- it would not interest me what the client's  
23 requested legal definition of their company or the  
24 contracting party, other than the pricing which we talked  
25 about.

1 BY MS. JANUS:

2 Q. The second document attached to the e-mail marked as  
3 Exhibit 305 is what Ms. Boone referred to as FICO's standard  
4 Blaze software license and maintenance agreement.

5 A. Yes.

6 Q. Do you see that? Okay. And this document in the first  
7 paragraph states that it's between Fair Isaac Corporation  
8 and Chubb & Son, a division of Federal Insurance Company?

9 A. Yes.

10 Q. Did you understand that the same entity was entering  
11 into both the software license and maintenance agreement and  
12 the master services agreement?

13 A. I would have no reason to think anything other than  
14 that.

15 Q. And, again, that entity was not of significance to you?

16 A. No.

17 Q. Paragraph 10.8 of the standard form license agreement  
18 relates to -- or is titled "no assignment." Do you see  
19 that?

20 A. I do.

21 Q. Are you familiar with that paragraph in the standard  
22 FICO license agreement?

23 A. I'm not familiar with it, but it is typical that a  
24 no-assignment clause would be contained within a software  
25 licensing agreement.

1 Q. Did you have any role in negotiating the no-assignment  
2 paragraph in the Chubb --

3 A. No.

4 Q. -- FICO license agreement?

5 A. No role.

6 Q. Have you ever been called upon to interpret the  
7 Chubb/FICO no-assignment provision in the license agreement?

8 A. No.

9 Q. As you sit here today, unless I asked you to read that  
10 paragraph in the final agreement, do you have any idea what  
11 the parties agreed to --

12 A. No, I don't.

13 Q. -- in connection with the no-assignment paragraph?

14 A. No.

15 Q. During your time at FICO, did you have occasion to deal  
16 with clients who merged with other entities and engaged with  
17 FICO relating to what that merger meant in the context of  
18 their license agreement?

19 A. Not during my tenure at FICO.

20 Q. Do you have any understanding based on your time at FICO  
21 as to how FICO deals with those types of situations?

22 A. Not at all.

23 Q. Handing you what has been marked as Deposition Exhibit  
24 333 -- no, actually --

25 A. I believe that the client definition as contained in

1 this paragraph --

2 THE COURT: Why don't we pause it now? There we  
3 go.

4 Members of the Jury, we've reached our morning  
5 break. So why don't we plan to be back in the courtroom at  
6 25 minutes to 11:00 on that clock.

7 THE CLERK: All rise for the jury.

8 **(Jury exits.)**

9  
10 **(In open court without the Jury present.)**

11 THE COURT: Okay. We're in recess. See you in 15  
12 or so.

13 **(Recess taken.)**

14  
15 **(In open court with the Jury present.)**

16 THE COURT: Go ahead and be seated.

17 All right. Mr. Hinderaker, we can continue.

18 BY MS. JANUS:

19 Q. Showing you what has been marked as Deposition Exhibit  
20 333 -- actually, no. You can have that back. Sorry. You  
21 can keep yours.

22 I'm handing you what has been marked as a document  
23 that was previously marked as Deposition Exhibit 108. This  
24 is an e-mail from John Haines to Bill Waid with a copy to  
25 you. And the subject is "Chubb question," correct?

1 A. That's correct.

2 Q. It's dated June 16th, 2006, so it's around the time that  
3 the parties have been negotiating the master services  
4 agreement, and the standard form license agreement was  
5 provided to Chubb at this time, correct?

6 A. Right. Yes.

7 Q. And John Haines says, "Bill, Chubb is inquiring again  
8 about an enterprise price, but they want to know if this  
9 would include international. I have attached the quote for  
10 your review, but I think that if they wanted to do an ELA,  
11 then for this price we could grant them global rights. They  
12 made need more Def seats beyond the 10, so maybe we bump it  
13 to a 30-pack." Did I read that correctly?

14 A. You did.

15 Q. Do you recall at this time that Chubb was asking about  
16 the enterprise price and whether it would include  
17 international?

18 A. Yes.

19 Q. And why was the enterprise price being discussed in June  
20 of 2006?

21 A. It's in response to -- it's in response to requests  
22 specifically by the client, and I believe that we talked  
23 about Ash Winshah's request for a global license capability,  
24 and that would have entered into the decision about  
25 executing the standard license agreement in June of 2006.

1 Q. Okay. So Chubb was inquiring about -- your  
2 understanding based on interactions with Chubb was that they  
3 were inquiring by enterprise pricing so that they could  
4 assess whether they wanted to enter into the first step of  
5 the license agreement in June of 2006?

6 A. Correct.

7 Q. And do you recall actually having e-mails or  
8 conversations with him about this topic?

9 A. It was a telephonic conversation.

10 Q. When did that occur?

11 A. Prior to June 16th.

12 Q. And what do you recall him saying?

13 A. He wanted to know if that which we were executing would  
14 include rights on an international basis.

15 Q. Did you respond to him during the phone call?

16 A. Ultimately, yes.

17 Q. What do you mean "ultimately"?

18 A. Finally we did respond, and the price that we had given  
19 them for Enterprise License Agreement --

20 COURT REPORTER: Speak louder.

21 THE WITNESS: The price that we had finally  
22 rendered for the Enterprise License Agreement was not  
23 accepted by the client.

24 BY MS. JANUS:

25 Q. And when did that response take place?



1 A. Prior to the execution of the licenses.

2 Q. In June of 2006?

3 A. Yes.

4 Q. So was the enterprise license price finalized prior to  
5 the license being entered into in June of 2006?

6 A. No.

7 Q. Okay. But a price was provided to Chubb prior to June  
8 of 2000 -- or in June of 2006 for enterprise?

9 A. I submitted a price to James Black, according to your  
10 document, on April 4th, 2006 for 2,585,000.

11 COURT REPORTER: Two million.

12 THE WITNESS: \$2,585,000.

13 BY MS. JANUS:

14 Q. Where are you looking at?

15 A. The attachment.

16 Q. Okay.

17 A. And that was not a number that Chubb wanted to even  
18 negotiate at that point. It was out of their price range.

19 Q. So was it left for another day?

20 A. I have, I have, I have no -- it was certainly put on the  
21 back burner.

22 Q. And this is in the June 2006 time period?

23 A. That's right.

24 Q. Okay. So you believe that you actually e-mailed this --  
25 the price quote that is attached to Exhibit 108 to Jim Black

at some point?

A. According to this document.

Q. Showing you what has been marked as Deposition Exhibit 226. If you look on the second page of the document and then the bottom of the first page, the same first two e-mails --

A. Yes.

Q. -- have started the e-mail, and then John Haines responds to Bill Waid with a copy to you, again, this is June 16th, 2006, with additional financial information for the Chubb Corporation, correct?

A. Yes.

Q. He states in the third full paragraph of his e-mail, "Net written premiums in 2005 increased 2 percent to 2.3 billion," correct?

A. Yes, he does.

Q. "Premiums for the insurance business grew 4 percent, 3 percent in the U. S. and 8 percent outside the U. S."?

A. Yes.

Q. So the Chubb Corporations outside of the United States's revenues are included in the information that John Haines is presenting to Bill Waid, correct?

A. That's correct.

Q. In the e-mail above that e-mail, second from the top of the page, Bill Waid writes to Mark Layden, who is mark

1 Layden?

2 A. Waid's boss.

3 Q. And this is again, June 16th, 2006. And he says, "Mark,  
4 this would be a 1.6 million dollar list price. John  
5 proposed 3 million with 30 percent. I recommend we do 1.6  
6 million with 20 percent. Thoughts?"

7 A. It sounds accurate.

8 Q. What do you mean, "It sounds accurate"?

9 A. That would come out to about a 1.3 million dollar net  
10 deal, and that would include global based upon the numbers  
11 that I see here.

12 Q. And then Mark Layden's response is, "You are correct.  
13 Let's not get greedy. You should make this easier if  
14 possible."

15 A. Tacit approval.

16 COURT REPORTER: What was that?

17 THE WITNESS: Tacit approval.

18 BY MS. JANUS:

19 Q. So at this point it appears that there has been approval  
20 for a global enterprise deal at 1.3 million dollars net?

21 A. Based upon what I see here, 20 percent of 1.6 million  
22 would be rounded to 1.3 million.

23 Q. We were talking about the negotiations between Chubb and  
24 FICO in June of 2006. The last document we looked at was  
25 Exhibit 226, which was dated June 16th, 2006.

1 I'm handing you what's been previously marked as  
2 Exhibit 107, which is an e-mail dated June 21, 2006.

3 I'm going to be focusing first on the e-mail from  
4 you which starts on the second page of Exhibit 107, but take  
5 your time to familiarize yourself with the document and let  
6 me know when you have done so.

7 A. Okay.

8 Q. Okay. Let's start with the first paragraph. What are  
9 you addressing in that first paragraph?

10 A. In the software business, quarterly revenue is very  
11 important. We wanted to bring this to a conclusion by the  
12 June 30th quarter end. And so the best time to sell to --  
13 to buy from a software vendor is at quarter ends. So  
14 they're looking for concessions expanding the scope when  
15 decreasing the price would be examples of concessions. And  
16 that's what we're doing here. I say without establishing a  
17 quid pro quo, meaning it doesn't follow, they, immediately  
18 or automatically, they are willing to work hard to expedite  
19 the agreement execution, especially if we would extend the  
20 scope beyond just the renewals that we had been talking  
21 about to include their overall processing, so the specialty  
22 business, which they call CSI Express.

23 Q. And so this is for that first contemplated stage of the  
24 license agreement?

25 A. That's correct.

1 Q. Okay. The second -- I'm sorry. The last sentence of  
2 the first paragraph states, "They have relented on a  
3 divisional ELA as it's unlikely that claims will be revamped  
4 any time soon." Do you recall what that refers to?

5 A. Divisional ELA would be the all-encompassing processing  
6 for the CSI division. CSI Express is a portion of that, a  
7 subset of that.

8 Q. And so do you recall, was that divisional ELA the  
9 contemplated second step of the license agreement?

10 A. At this time it was relented. They did not pursue the  
11 divisional ELA.

12 Q. Okay.

13 A. But I know that later on they did move to that.

14 Q. Okay. And then you talk about the statistics in 2005  
15 below your first paragraph; correct?

16 A. Yes.

17 Q. And is that relevant to the pricing decision that  
18 you're -- and scope decision that you're bringing to --

19 A. Since the pricing model is contingent upon a  
20 determination as to the size of the deal, small, medium and  
21 large, if you extended to CSI Express, it might push from a  
22 small application to a medium application, which would  
23 affect the price computation.

24 COURT REPORTER: What?

25 THE WITNESS: Computation.

1 BY MS. JANUS:

2 Q. Under the chart you write --

3 A. Yes.

4 Q. -- "The following additional salient points should be  
5 considered."

6 (Interruption during the video)

7 THE COURT: I think that's on the video. Believe  
8 me, you wouldn't confuse it if it were in the courthouse.

9 BY MS. JANUS:

10 Q. In your first point, which is labeled A, you talk about  
11 your offer on the table. Could you explain what the details  
12 are in the offer? So you could start with 880,000 in deploy  
13 license. What is that?

14 A. That's the actual software license --

15 Q. Okay.

16 A. -- itself, yeah, plus the 6075, which would be for the,  
17 the five seats.

18 Q. And how is that different, the deploy license versus the  
19 developer seats?

20 A. I don't have a recollection that there is a difference.

21 Q. Well, it may be sort of second nature for you because  
22 you're in the industry; but if you were going to describe to  
23 someone, what is a developer seat in the context of a  
24 software license agreement?

25 A. It's the number of people who can simultaneously access

1 the software for the purpose of building it.

2 Q. And the deploy aspect of the license?

3 A. I don't remember the term "deploy license."

4 Q. Okay.

5 A. No recollection of it.

6 Q. Okay. The next thing is training is at 40K. So there  
7 was an aspect of the deal that FICO would provide training  
8 for 40,000?

9 A. Yes.

10 Q. And "PS engagement will likely go for somewhere between  
11 650,000 and 800,000, depending on final configuration."  
12 What is that?

13 A. For the renewal segment for CSI, we would charge for our  
14 technicians to build the software depending upon the  
15 statement of work, so priced between \$650 and 800,000  
16 additional, over and above the license costs.

17 Q. Subpart B is "Upon undertaking a rewrite of CSI Express,  
18 we would likely close a PS deal of at least one million."

19 What does that --

20 A. Again --

21 Q. -- mean?

22 A. I'm sorry. Assuming that we're talking about the larger  
23 component of which renewals is a subset, but to utilize our  
24 professional services technical staff to rewrite their  
25 entire processing business, CSI Express, the deal would be

1 one million dollars.

2 Q. Subpoint C is, "The renewal project is a showcase that  
3 will -- when successfully completed in December 2006 --  
4 result in a push to negotiate a global ELA that Bill Waid  
5 has quoted at around 1.6 million with 100 percent credit of  
6 the license amounts paid in the previous 12 months."

7 Did I read that correctly?

8 A. Absolutely, yes. And the interpretation or variation of  
9 that is this initial small project, small -- in pricing  
10 terminology small is that first step; and once the results  
11 are shown and the value is perceived, there will be add-on  
12 requirements for the global ELA, which Waid has said would  
13 be 1.6 million.

14 Q. And in this e-mail on June 21, 2006, you do not state  
15 that Chubb has rejected the proposed global ELA price,  
16 correct?

17 A. Well, it's at this point, as I look at this, it's off  
18 the table for this first go-around; but once the results of  
19 the production implementation is accomplished, they would be  
20 interested in going the next step.

21 Q. Okay. So it was still on the table for future --

22 A. That's right.

23 Q. -- negotiation?

24 A. Exactly right.

25 Q. Then you say, "John, we're at a critical point in the



1 negotiation of the PS deal. I'd like to be able to give a  
2 small win to the Chubb team, and I think we'll more than  
3 make it up in goodwill dollars going forward."

4 What did you mean by that?

5 A. Because of the size of the professional services  
6 engagement, I was recommending that they expand the scope  
7 beyond the renewal segment to include all CSI Express for no  
8 additional expense.

9 Q. Handing you what has been marked as Deposition  
10 Exhibit 333.

11 COURT REPORTER: What number?

12 MS. JANUS: 333.

13 BY MS. JANUS:

14 Q. This is a series of e-mails, if you want to just take a  
15 look through it and let me know when you have familiarized  
16 yourself with it.

17 A. Good. I'm ready whenever you are.

18 Q. Okay. So Exhibit 333 starts with the same e-mail  
19 exchange that we looked at in Exhibit 107 towards the back  
20 of the document, correct?

21 A. In the back, yes.

22 Q. And then there are a couple of additional e-mails  
23 exchanged between you and others on the FICO team, correct?

24 A. Yes.

25 Q. On the bottom of the second page and the top of the

1 third page, Bill Waid wrote to John Haines on June 21, "Are  
2 these annual numbers? What is net written premium?"

3 So he, again, is looking for the, as you called  
4 it, the macro information relating to the entity's revenues?

5 A. Yes.

6 Q. Then John writes to you on June 21, 2006, and says,  
7 "Larry, see Bill's comments below. Let's clarify info  
8 before we make the deal, but I also want to get the  
9 reference, press release, and case study commitment too."

10 What is he referring to there?

11 A. If we sweeten the deal as Chubb requested we do, we want  
12 some assurance that they will, A, always be a good reference  
13 for us and that we could refer other clients outside of  
14 Chubb or even within Chubb to this group for positive  
15 feedback, which would help us sell new business, likewise, a  
16 press release, which is where the joint -- well FICO and  
17 Chubb would agree on wording to announce this close of  
18 business and what they're intending to do with the business  
19 and what the potential results could be and that would be  
20 important for us on a marketing basis, and also finally for  
21 us to professionally write up a slip page, two-page  
22 document, that would describe the business problem and the  
23 business solution and the results perceived as a result of  
24 the implementation, and that would be in the form of a case  
25 study, and that's typically the way most software

1 organizations sell their -- and market their product to  
2 others. It's a mechanism of case studies. That would be a  
3 real value -- I'm sorry -- that would be real value to FICO.

4 Q. You respond at the bottom of the first page of  
5 Exhibit 333 on June 21 to John Haines, and you include  
6 information relating to CSI underwriting processes, correct?

7 A. Yes. Yes.

8 Q. Including the number of renewals, the number of new  
9 business quotes, number of policies issued and what  
10 percentage renewals represent, correct?

11 A. Yes.

12 Q. And then you include additional information relating to  
13 the -- Chubb specialty insurance line of business, including  
14 the fact that it has 1,000 employees and 3.5 billion in  
15 revenue, correct?

16 A. Right.

17 Q. And then if you follow the chain up, it looks like at  
18 the top of the first page Bill Waid approves the proposal  
19 that you made?

20 A. That's correct.

21 Q. Showing you what's been marked as Deposition  
22 Exhibit 110. After you've had a chance to familiarize with  
23 this document, my question would be, Do you recognize  
24 Exhibit 110 to be the final software license and maintenance  
25 agreement between Chubb and FICO, along with Amendment One

and Amendment Two?

A. Yes.

Q. So the final software license agreement was entered into a June 30th, 2006, correct?

A. Correct.

Q. Showing you what has been marked as Deposition Exhibit 111, this is an e-mail from Sally Holt to Bill Waid dated December 1, 2006.

MR. HINDERAKER: I suppose for clarity of the record we should just acknowledge that this is an excerpt from a document that is probably an inch thick. I understand why we're dealing with only a selected portion of it, but just so we know where it came from.

MS. JANUS: Yes.

BY MS. JANUS:

Q. The attachment to the e-mail is named "SE Opt Reports." Do you see in the subject line of the e-mail?

A. Yes.

Q. And the attachment to Exhibit 111 is an excerpt from that document as it was produced by FICO.

A. Yes.

Q. If you look at the page labeled on the bottom 5639, there is an entry or several entries under the heading "Chubb Global" ELA. Do you see that?

A. Yes.

1 Q. And do you recall what the purpose of the document was  
2 at FICO?

3 A. I have never seen it before. It was done by Sally, who  
4 is the director of engineering, reporting to Bill Waid.  
5 It's not something that I would typically see that I  
6 remember anyway at this point.

7 Q. So the title of the entry is "Chubb Global ELA,"  
8 correct?

9 A. Yes.

10 Q. And if you look halfway down the page, there is a yellow  
11 set of boxes under the heading "Current Status." Do you see  
12 that?

13 A. Yes.

14 Q. It says, "Last update date November 30th, 2006,"  
15 correct?

16 A. Yes.

17 Q. And then it says, "Current status, pricing sent to Chubb  
18 of 1.5 million for global ELA (Blaze Advisor)," correct?

19 A. Correct.

20 Q. At this time FICO and Chubb were negotiating the  
21 enterprise aspect of the license agreement, correct?

22 A. That's correct.

23 Q. This document indicates that internally at Chubb the ELA  
24 that was being negotiated was considered to be a global ELA,  
25 correct?

1 A. We were negotiating for a global ELA, correct.

2 Q. Were you communicating with Sally about the status of  
3 those negotiations, do you recall?

4 A. I was speaking with Sally fairly regularly at this  
5 point. It was a big deal, and so Sally was tracking its  
6 progress, and Sally did participate, it seems, according to  
7 this note, that we did do an on-site meeting with 30  
8 attendees to discuss the commercial side of the business and  
9 get closer to an ELA in 2007.

10 Q. It was a big deal, meaning a big deal for FICO?

11 A. Size, dollar size.

12 Q. Yep. In the entry below the one you just referred to  
13 with the 30 attendees --

14 A. Yes.

15 Q. -- the document states, "Larry has been working with  
16 Chubb to get an ELA through this year. The total after  
17 credit for global ELA, including COBOL and SmartForms, was  
18 priced out at 1.5 million. I need to get an update on  
19 Chubb's response to the proposal." Is that right?

20 A. Yes.

21 Q. So is the 1.5 million proposal one that you provided  
22 after entering into the June 2006 portion of the license?

23 A. Yes.

24 Q. Do you recall how you provided that?

25 A. No, I don't.

1 Q. Do you recall who you provided it to?

2 A. Not specifically, no.

3 Q. Do you recall any e-mails or discussions that you were  
4 having in this time period with Chubb relating to the global  
5 ELA?

6 A. Yes.

7 Q. Tell me what you recall.

8 A. One negotiating point was that the 1.5 million was too  
9 high, and there was a determination to de-limit the ELA by  
10 two factors. One is a COBOL, that's capitol C-O-B-O-L,  
11 version of the software, and the second is to de-limit  
12 SmartForms, which is a functionality specifically included  
13 as an option, and together those would be \$200,000, which  
14 would bring down the price of the global ELA to 1.3 million  
15 dollars, which is consistent with the Waid's original.

16 Q. That was consistent with the e-mail we looked at earlier  
17 today with the 1.6 and the 20 percent discount?

18 A. Yeah -- well, Waid wasn't talking -- I don't know  
19 whether he was talking about a global ELA at that 1.3  
20 number. This appears to be 1.3 million.

21 Q. Right. And we can -- I mean, the record speaks for  
22 itself.

23 A. Yes.

24 Q. We did look at an e-mail talking about global and that  
25 number; but when you're talking about the de-limiting of

1 COBOL and SmartForms and the 1.3 number, where are you  
2 looking on the document?

3 A. That's not contained on this.

4 Q. And so there was -- there were conversations between you  
5 and Chubb that FICO could do the global ELA deal for 1.3  
6 million if COBOL and SmartForms were taken out of the --

7 A. That's my understanding.

8 Q. Do you recall who you had those conversations with?

9 A. No. It would have been John Haines, and he in turn with  
10 Bill Waid.

11 COURT REPORTER: And then in turn --

12 THE WITNESS: And he in turn with Bill Waid.

13 BY MS. JANUS:

14 Q. Do you recall who at Chubb you had the conversations  
15 with?

16 A. I, I don't have a specific recollection, but I would say  
17 Sully.

18 Q. Did Sully express to you why it was important to Chubb  
19 to obtain a global license?

20 A. It was beyond his purview. He is not a global person.

21 Q. So he was just passing on requests from others at Chubb?

22 A. That's right.

23 Q. Showing you what has been marked as Exhibit 113. This  
24 is an e-mail from you to Mark Layden, Michael Gordon, Bill  
25 Waid, John Haines, Russ Schreiber on December 12th, 2006.



1 The subject of the e-mail is "Chubb ELA pricing rationale  
2 from Russ and Larry," the quote pursuit team, correct?

3 A. Yes.

4 Q. And what do you mean by "the pursuit team"?

5 A. The people who are driving the conversation, the sales  
6 team.

7 Q. The conversation with Chubb?

8 A. Yes.

9 Q. Do you recall what this e-mail related to, generally?

10 A. Yes. Mark Layden was going to have a personal  
11 conversation with Folz and Bolen and negotiate the close --  
12 closure.

13 Q. Of the enterprise aspect of the license agreement?

14 A. What was remaining for December, yes, for a December  
15 close.

16 Q. So was your purpose in writing this e-mail to update  
17 them relating to the current status of negotiations?

18 A. That's correct.

19 Q. At this point on December 12th, the ELA that was being  
20 negotiated was a global ELA, correct?

21 A. I don't know the answer to that. I don't see that.

22 Q. Take a look at the back of Exhibit 113, the second page  
23 of the e-mail. In the third paragraph on that page, you  
24 say, "Again, we're at 1.05 million for global ELA plus 50K  
25 for unlimited seats."

1 A. Okay.

2 Q. Does that refresh your recollection then at this point  
3 the negotiation was for a global ELA?

4 A. Yeah, and that number a million 50 is net, net meaning  
5 after credits.

6 Q. What do you mean by that?

7 A. There was a stipulation that the June '06 contract  
8 payments, the 350K, would be creditable towards an ELA if it  
9 were done in '06, and these numbers here are net numbers.  
10 Although it doesn't say it specifically, it's intended that  
11 that million, 50 was after the \$350,000 credit.

12 Q. Okay. So that's just something you recall?

13 A. Yes.

14 Q. Okay. Because that's not apparent from the document --

15 A. No, not at all.

16 Q. -- the document itself, correct?

17 A. That's right.

18 Q. Same question for e-mails. Do you recall whether any of  
19 the back and forth relating to the December discussions took  
20 place, between FICO and Chubb, took place by e-mail?

21 A. No, I don't remember that. Typically we would do it in  
22 telephone conversations, negotiating.

23 Q. Then there is the pricing rationale section and you say,  
24 "Following is a breakdown of premium revenue '05 by business  
25 unit at Chubb," correct?

1 A. Yes.

2 Q. And this is information that you took from their annual  
3 report?

4 A. I don't remember. I would have.

5 Q. Okay. Why did you include that information in this  
6 e-mail?

7 A. Again, it's consistent with our macro pricing model, the  
8 macro pricing model being that we would take a percentage of  
9 the revenues as our fee. Interestingly, the international  
10 piece of business is not here. This total is like 90  
11 percent and --

12 Q. Well, if you look at the next page --

13 A. Oh, there it is. 8.1. Okay. There it is. Okay.

14 Q. So the global business is included --

15 A. Yes.

16 Q. -- in what you set forth for the pricing rationale,  
17 correct?

18 A. Yes.

19 Q. Again -- okay. So the next paragraph states, "Again,  
20 we're at 1,050,000 for global ELA plus 50,000 for unlimited  
21 seats," correct?

22 A. That's what it states.

23 Q. And then you say, "I think we need to find out what  
24 number they're trying to fit too, so we can possibly offer  
25 the ELA in chunks as we did the June deal. Chunks could

1 include .NET, Java or unlimited Dev sets," correct?

2 A. Yes.

3 Q. So you thought that there would still be some room to  
4 maneuver on the price for the global ELA?

5 A. Piecemeal Yes.

6 Q. All right. Moving on then to Exhibit 112. This is an  
7 e-mail exchange between you and Jim Black and Russ Schreiber  
8 and then -- so lower on the page and then at the top some  
9 internal correspondence. Give me a sign when you've had a  
10 chance to review it.

11 A. Sure. Okay.

12 Q. And then Russ says, "As I was thinking about it, why we  
13 would drop our price further (other than being easy), a  
14 press release would be worth 100K to us."

15 Do you see that?

16 A. Yes, I do.

17 Q. So Russ Schreiber was suggesting that dropping the ELA  
18 price by 100,000 in exchange for a press release would be,  
19 would be --

20 A. Good business.

21 Q. -- good business?

22 Mr. Wachs, before the break we were talking about  
23 the e-mails that were exchanged in December of 2006 among  
24 FICO employees relating to the negotiation of the enterprise  
25 aspect of the license, correct?

1 A. Correct.

2 Q. Did you conclude at that time that Chubb had purchased a  
3 global Enterprise License Agreement?

4 A. I did not conclude that.

5 Q. Did you conclude that Chubb had purchased a license that  
6 was in some way different from a global Enterprise License  
7 Agreement?

8 A. In none of the conversations and during the pricing  
9 finally agreed upon did we extend beyond the United States  
10 as far as I know.

11 Q. So --

12 A. As far as I remember.

13 Q. So at the time you were not a part of the conversation  
14 that took place to finally negotiate the Enterprise License  
15 Agreement between Mark Layden, Phil Folz and Julia Bolen,  
16 correct?

17 A. That's correct.

18 Q. And you have no recollection of any conversations with  
19 anyone relating to the outcome of that meeting, correct?

20 A. Correct.

21 Q. Did you actually form a conclusion about whether the  
22 Enterprise License Agreement that was entered into in  
23 December 2006 was global or not global?

24 A. I didn't have any reason to form that conclusion. No  
25 one asked me.

1 Q. So I've handed you what has been marked as Exhibit 116.  
2 Is this one of the documents you reviewed to prepare for  
3 your deposition?

4 A. Yes.

5 Q. This is an e-mail from you to Russ Schreiber dated  
6 November 26th, 2008, correct?

7 A. That's right.

8 Q. Having reviewed the document, do you recall what led to  
9 you writing this e-mail?

10 A. It appears that it was a request from Russ Schreiber for  
11 my views on the status of the ELA and whether it did include  
12 a global provision or not.

13 Q. And do you recall actually having a conversation with  
14 Russ Schreiber on that topic?

15 A. No, I don't have a recollection of that.

16 Q. You state that in reviewing your notes and some archived  
17 e-mails, "It's apparent to me that the corporate ELA that  
18 was negotiated with Phil Folz and June Drewey intended to  
19 include the global license," correct?

20 A. That is what I stated.

21 Q. So you concluded after reviewing archived e-mails and  
22 your notes that the ELA was a global license?

23 A. That's -- that I don't agree with necessarily. It says  
24 that it's apparent that it intended to include the global  
25 license, but I can't tell you specifically that it did.

1 Q. Okay. What is the distinction between what you're  
2 saying and what I said?

3 A. Well, the way I worded it, it's apparent that it  
4 intended to include the global license. The question is in  
5 the final what was actually paid by Chubb would indicate  
6 that there is a difference of about \$100,000, and I don't  
7 see the wording, for example, changed from a definition of  
8 territory. So there is some evidence that it did not  
9 include -- that it was never finally accepted as global, but  
10 I don't have the e-mail or any thread from Phil -- from Mark  
11 Layden to indicate what was finally agreed on at that  
12 private meeting that he attended, so I can't draw that  
13 conclusion. It's apparent that they wanted global, but I  
14 don't know if it ever came to fruition.

15 Q. So you just don't know --

16 COURT REPORTER: If it ever came to what?

17 THE WITNESS: Fruition.

18 BY MS. JANUS:

19 Q. But you believe that it was intended to include --

20 A. That's right.

21 Q. -- the ELA was intended to include the global license?

22 A. That is what I said.

23 Q. Do you know whether in fact after November of 2008 FICO  
24 assisted Chubb in implementing the Blaze Advisor software in  
25 Europe?

1 A. I don't believe that that was the way I read the e-mail  
2 from the invitation of Mike Sawyer when he states that to --  
3 license agreement and a plan for Chubb Europe, he's talking  
4 about a sales opportunity.

5 Q. So you don't know whether FICO interpreted the  
6 Enterprise License Agreement going forward as including  
7 global access or not. You just don't know?

8 A. I don't know.

9 Q. What notes are you referring to in your e-mail marked as  
10 116?

11 A. It would be the notes that -- the e-mails that you have  
12 produced here clearly. Notes would have been perhaps  
13 notebooks of -- as I attended meetings, I may have taken  
14 notes at the meeting.

15 Q. So handwritten notes that you may have?

16 A. Handwritten notes, yes.

17 Q. Okay. And do you know where those handwritten notes are  
18 today?

19 A. Thrown away years ago.

20 Q. Was that something that you took with you when you left  
21 FICO?

22 A. The notebooks, yes.

23 Q. And do you know for a fact that you don't have those  
24 anymore?

25 A. Yeah. We had a super storm, Sandy, and those notebooks



1 were in the basement and are no longer available.

2 MS. JANUS: Those are all the questions I have for  
3 you.

4 THE WITNESS: Thank you.

5 MS. JANUS: Thank you for your time today.

6 THE WITNESS: Thank you.

7 MR. HINDERAKER: I have a few questions for you.  
8 Let me get my materials.

9 **EXAMINATION**

10 BY MR. HINDERAKER:

11 Q. Mr. Wachs, I'm going to give you a copy of Exhibit 143,  
12 and you -- can you identify this as the RFI that was  
13 received from Chubb & Son, a division of Federal insurance  
14 company?

15 COURT REPORTER: You identified this as the what?

16 BY MR. HINDERAKER:

17 Q. Can you identify this as the RFI that was received from  
18 Chubb & Son, a division of Federal Insurance Company,  
19 regarding its interest in the Blaze Advisor software?

20 A. Yes, I can.

21 Q. Okay. And that is what it is?

22 A. That is what it is.

23 Q. Okay. I just -- you mentioned some of this in your  
24 earlier testimony, I believe, but if you would go to page 5  
25 of this exhibit. And you see in the third paragraph there

1 is a description of the Chubb & Son specialty insurance?

2 A. Yes, I do.

3 Q. All right. And referencing the relatively small number  
4 of very large accounts, referencing the 1,000 employees that  
5 we have seen in some of your e-mails, and then it has a  
6 sentence, "The key strategic initiative in this area is  
7 expanding and growing the business into mid-market and  
8 smaller accounts." Do you see where I have read?

9 A. Yes.

10 Q. Did you learn anything more from Chubb & Sons regarding  
11 that -- the nature of that key strategic initiative and your  
12 response to the RFI?

13 A. Yes. They -- by expanding the marketplace to the small  
14 and middle-sized accounts, they expected an order of  
15 magnitude increase in the number of work items that they had  
16 to review and underwrite, and they did not have the staff  
17 and did not have the budget for the staff that would be  
18 necessary in their current processing manner. And so they  
19 were looking for an automated decision and management  
20 software that would positively affect the scalability of  
21 their business so that they could take on new revenue  
22 streams.

23 Q. And by "scalability," that's a phrase you used earlier.  
24 Would you tell us what that means?

25 A. To bring about -- for the use of automation to bring

1 about productivity gains so that their investment in the  
2 processing can be reduced and they would not have to hire  
3 and train and manage additional staffing.

4 Q. Is scalability a way of saying the ability to handle  
5 higher volumes of business?

6 A. Sure.

7 Q. And how did -- how did you present Blaze Advisor  
8 software as meeting that key strategic initiative?

9 A. Decision management software in general and specifically  
10 Blaze Advisor, as an industry leader, is able to process  
11 large volumes of transactions, requests for decisions, rules  
12 basis or -- can be greater than 25 to 50,000 rules making  
13 decisions, and it can all be done in machine time. So they  
14 are able to meet deadlines, take on new business and -- and  
15 become a much more agile organization as they can very  
16 easily do what I call what-if transactions where they can  
17 run the book of business at certain rules and then modify  
18 the rules and run the same book of business and see the  
19 positive effect on their balance sheet and profit and loss  
20 statements.

21 Q. You mentioned the what-if analysis earlier, and I  
22 appreciate the description. How does that benefit -- how  
23 does that benefit Chubb & Son?

24 A. They can make informed business decisions and they're no  
25 longer trial and error. They're able to determine what

1 level of investment and what marketplace to spend in, for  
2 which gets the biggest bang for the buck.

3 Q. Does it have any impact on speed?

4 A. It's all about speed, not only speed of processing, but  
5 there's the speed of examining the marketplace and being  
6 able to change things quickly and interactively based upon a  
7 sensing of what's going on in the marketplace.

8 Q. With that ability, can you get products to market  
9 faster?

10 A. It's all about time to value, yes.

11 Q. And by "time to value," what do you mean by that?

12 A. Once there is a perceived need for modification of the  
13 software, being able to set about to invoke a standard  
14 development life cycle and get a product -- a change or a  
15 new rules base or a new decision into production very  
16 quickly.

17 Q. And how does that relate to or impact the ability of  
18 Chubb & Son to have a new insurance product to market? You  
19 can you answer my question, please.

20 A. Sure. You're able to modify the book of business on the  
21 fly by business people rather than technologists. You don't  
22 have to suffer the standard queue online waiting for the IT  
23 folk to make changes, because the business people are able  
24 to make their changes with the software in English language  
25 without having to do coding. That enables them to change

1 things, to run AB analysis examining different groups,  
2 changing the rules, and they can -- seeing the results of  
3 those rules. It positively affects the business.

4 Q. If you turn to page 6 of the RFI, and you see it lists  
5 out the current CSI business goals and then it has four  
6 bullet points. Can you tell us more from -- did you learn  
7 more from Chubb & Son with respect to those business goals?

8 A. As a result of our discovery effort, are you saying?

9 Q. Yes, as a result of your working with Chubb & Son.

10 A. I believe that they well stated their business goals,  
11 they understood their business well.

12 Q. Okay. Good. Then on page 7 of the RFI, they describe  
13 their current state of renewal processing. If you would  
14 review that for a moment.

15 And my question is going to be to you on your  
16 discussions and -- from your discussions with Chubb & Son,  
17 what changes to their current state were they seeking to  
18 achieve through the technology of Blaze Advisor?

19 A. Well, there were a number of different changes. For one  
20 thing, they ran their policy -- the policy is up for renewal  
21 on a monthly basis in -- in the current state of the world.  
22 They were looking to do that with much more -- the cycle  
23 time could be reduced greatly, they could run them daily,  
24 or, more importantly, they could be run by the business unit  
25 rather than waiting for a technologist to run those cycles

1 so that they can make adjustments to the extent that you can  
2 change a policy rating more interactively, you can derive a  
3 greater profitability because of the period of time that you  
4 are now able to -- a variation in price rather than go with  
5 the standard pricing, so you created a value in your actual  
6 premium revenues.

7 The ability to -- they talk about Section 1 rules  
8 within their specialty renewal business. They can vary the  
9 attributes of the claims, of the -- I'm sorry -- of the  
10 limits and the deductibles and the term length in various  
11 ways and be able to penetrate and make changes that create a  
12 better reward-risk ratio and thus greater revenue  
13 profitability.

14 Q. And if we go to page 11 of the RFI, there is a heading  
15 at the bottom of the page, "Renewal processing: Future  
16 state."

17 A. Yes.

18 Q. And they -- Chubb & Son in the RFI says, "The goal of  
19 this project is to create an application and architecture to  
20 allow for a streamlined rules" --

21 COURT REPORTER: To what?

22 BY MR. HINDERAKER:

23 Q. -- 'to allow for a streamlined rules-based renewal  
24 processing engine."

25 It goes on to say, "An additional goal is to build

1 the foundation for a future state architecture for  
2 rules-based processing that can be applied to new projects  
3 as we seek to improve the efficiency of our  
4 business-processing environment."

5 A. A key architectural element of a rules-based product  
6 like Blaze Advisor is that the rules are separated from the  
7 likes and stored in a nonredundant central mass database;  
8 therefore, as new products get created, you can now utilize  
9 the rules that are sitting in this database for your  
10 application without having to continually rewrite those  
11 rules and then also to conform that a single rules change,  
12 like an interest rate, for example, or risk factor in  
13 changing it in one place, in one rule, can then affect all  
14 of the applications that are drawing on that one rule  
15 change. So your ability to come to market with new products  
16 in a new architecture is greatly enhanced.

17 Q. Is that an element -- is that a matter of speed again?

18 A. Certainly speed is a key consideration.

19 Q. What other considerations go into that?

20 A. Uniformity, auditability, the ability for a business to  
21 consistently apply rules for the ability of people to  
22 understand the rules that are firing and the decisions that  
23 are being made. And that's key in customer service. It's  
24 key in business to be able to accept or reject business.

25 Q. Would you -- thank you. Would you look and find

1 Exhibit 105, please. Well, rather than search around, here  
2 is another copy of it.

3 You were asked about Exhibit 105 earlier today,  
4 and this is an another copy of Exhibit 105. And I guess my  
5 question to you about this, about this Exhibit 105 -- I  
6 guess first we should establish that you are the author of  
7 the content?

8 A. I am.

9 Q. And with respect to FICO's response to Chubb & Son's  
10 RFI, is Exhibit 105 a fair summary of the response?

11 A. Of whose response?

12 Q. Of FICO's response to the RFI.

13 A. In broadly general terms, yes.

14 Q. So as we saw, the RFI is dated early February 2006.  
15 Your e-mail, Exhibit 105, is February 22, 2006. In those  
16 discussions that you had with Chubb & Son, either weekly or  
17 every ten days that you mentioned, what was the subject  
18 matter of those discussions as you moved the process forward  
19 before the license agreement was signed?

20 A. Typically, those conversations had to do with the  
21 creation of a proof of concept that would enable us to  
22 remove any doubt that we had the superior product. While  
23 there were other rules management systems on the market, it  
24 was incumbent on FICO at the time to be able to show that  
25 rules could be created faster, that they could be executed



1 faster, that they could be managed easier and by business  
2 people.

3 And each one of those attributes of the product  
4 needed to be proved to the client, and so we would create  
5 code, show examples of what we did, and define the scope --  
6 understand their rationale and how they create their rules  
7 and how they would create them in the new existence and new  
8 product. And then it was a question of refining their scope  
9 so that we can give accurate pricing --

10 Q. Okay.

11 A. -- for both the product as well as the professional  
12 services engagement.

13 Q. All right. So let me move the process forward a little  
14 bit to after the license agreement is signed in June of  
15 2006. Is there a next phase that might be called client  
16 acceptance or client testing? What was the next phase?

17 A. Well, as the license agreement is executed and then the  
18 master services agreement was executed, it was necessary for  
19 us to craft the actual product and the way it worked within  
20 their environment. That required our technical people to  
21 begin to code, to begin to draft a bespoke version of the  
22 software that made sense to the application it was being  
23 written for. Like any other application development  
24 project, you have to follow a certain structured development  
25 life cycle.

1           Once the units -- and I call them units. I call  
2           them building blocks. Once those building blocks are  
3           created, you unit test each of those building blocks, and  
4           then you start to glue those building blocks together to  
5           perform a more fully functional product, which then can be,  
6           again, tested by the users in the form of acceptance testing  
7           or full quality control to make sure that if I run this  
8           business in the as-is state and then I run it again in the  
9           future state, I'm going to get the same results or that I am  
10          going to accept the changes because that was designed that  
11          way.

12                 So what I'm saying is, you have to quality control  
13          your product acceptance, and that was conditional, and  
14          anybody that is buying a professional services engagement  
15          has to be able to finally accept the work product  
16          deliverable. And those are steps -- were key steps in the  
17          process.

18          Q. And were you involved in that process with Chubb & Son?

19          A. Yes, I attended the status meeting.

20          Q. Okay. And were you in meetings where either the  
21          business people or the IT people of Chubb commented upon the  
22          performance of the software in that context of the  
23          acceptance testing?

24          A. One of those folks -- and this is told to me by, I  
25          believe, Sully -- was so impressed, he said that I just did

1 in one afternoon myself, utilizing the Blaze Advisor  
2 software, something that would have taken months and  
3 hundreds of thousands of dollars of budget for that same  
4 process to be done by IT. This product implementation has  
5 basically paid for itself on the first time we ran it.

6 Q. And that was from Sully?

7 A. Yes.

8 Q. Okay. And then did any of the business -- did any of  
9 the business people of Chubb & Son comment on how the use of  
10 the product, that is, Blaze Advisor, would be able to assist  
11 them in growing their revenue, moving into the mid-market?

12 A. Only that within the first full year they did succeed in  
13 accepting considerably more business than they had in the  
14 previous year for no increase in staff.

15 Q. This was identified in an earlier deposition as  
16 Exhibit 330, dated November 3, 2006. Placing a time, it's  
17 after the June license agreement. It's after the divisional  
18 and it's before the second amendment.

19 Do you know who prepared Exhibit 330?

20 A. I did.

21 Q. And what was the purposes of Exhibit 330?

22 A. Sales training within FICO.

23 Q. So internal, internal to FICO?

24 A. Yes.

25 Q. Okay. And I think maybe the title tells us what we need

1 to know, but would you just give us a general description of  
2 what this document was intended to say and teach?

3 A. It was a full, if you will, client journey document here  
4 which described the business need, the intended solution,  
5 how we built the solution, and the results of the  
6 implementation.

7 Q. Okay. And is this fair to say that this summarizes your  
8 firsthand experience in that process of selling to Chubb?

9 A. Certainly.

10 Q. Maybe just a couple more questions about this. If you  
11 go to the page that is 5877 where it says, "Chubb specialty  
12 insurance business" and has the bullet points.

13 A. Yes.

14 Q. What, what was the source of this information that's on  
15 this letter?

16 A. Interestingly, the bullet that talks about 3.5 billion  
17 comes from the RFI from Chubb.

18 Q. Mm-hmm (Yes).

19 A. 1,000 employees comes from the RFI. 100,000 policies  
20 written comes from RFI. And the enterprise-wide premium  
21 revenue comes from the earlier intent -- or I should say a  
22 summary intent to talk about what would have come from the  
23 annual report.

24 Q. Okay. And then on the next page, which is 5878, same  
25 question: What was the source of your understanding of the

1 Chubb current state?

2 A. Initially, in that first response, it was the RFI, and  
3 it was refined through subsequent weekly conversations with  
4 the technology team headed by Sully.

5 Q. And then on the next page, 5879, you lay out the vision  
6 statement and then you lay out success criteria. Do you  
7 know if the success -- do you know if the success criteria  
8 were met?

9 A. I do know that they automated their renewals --

10 Q. Mm-hmm.

11 A. -- in short order. I do know that from the testimony of  
12 the business people that they did -- they were able to  
13 access and modify the rules; and through the analysis tools  
14 of the Blaze Advisor product, they would be able to know  
15 which rules are the best rules and which rules are the worst  
16 rules and, in effect, modify them accordingly.

17 THE COURT: All right. Members of the Jury, we're  
18 going to take our break now. And I have a matter that I and  
19 the lawyers need to take up during the break, so why don't  
20 you plan to be back in the courtroom at 1:35 on that clock.  
21 Okay?

22 THE CLERK: All rise for the jury.

23 **(Jury exits.)**

24  
25 **(In open court without the Jury present.)**

1 THE COURT: All right. Go ahead and be seated.

2 We're going to take about a ten-minute break here,  
3 and then I will come back up and give you my ruling on the  
4 various issues that have been briefed over the last couple  
5 of days. Okay? Be back here about 12:00 or shortly  
6 thereafter.

7 **(Recess taken.)**

8

9 **(In open court without the Jury present.)**

10 THE COURT: All right. Let's go on the record.

11 All right. We're here in the courtroom outside  
12 the presence of the jury. I'm going to give the Court's  
13 ruling on the various cross motions for exclusion of  
14 evidence of -- defendants' motion to exclude evidence of  
15 settlement agreements that FICO has achieved with other  
16 Blaze Advisor licensees, and those are basically Dockets  
17 Numbers 1086, 1094 and 1103, and FICO's motion to exclude  
18 evidence of perpetual licenses between FICO and other Blaze  
19 Advisor licensees. Those are Dockets 1097, 1098, 1101, and  
20 I believe either 1103 or 1106 from this morning -- 1106 from  
21 last night, rather.

22 In order to give context to my ruling and further  
23 guidance, I will give the parties -- I'm going to start with  
24 the legal rule as it relates to actual damages in this case.

25 Judge Wright has found and neither party

1 challenges that the measure of actual damages in this case  
2 is both for the alleged infringement and the alleged breach  
3 of contract, that that measure is the market value of the  
4 license fee for the infringing use. This is found by  
5 applying an objective standard using the paradigm of a  
6 hypothetical negotiation between a willing seller and a  
7 willing buyer.

8 As described by the Second Circuit in the *On Davis*  
9 case, which appears to be the seminal decision in this area,  
10 and it is the one on which Judge Wright relied most heavily,  
11 and here I'm going to fully quote the relevant language from  
12 that case.

13 "The reasonable license fee on which a willing  
14 buyer and a willing seller would have agreed for the use  
15 taken by the infringer," and again I'm going to emphasize  
16 that last seven words of that test, "for the use taken by  
17 the infringer," which is quoted at 246 F.3d at 167.

18 It is clear to this Court from *On Davis* and the  
19 cases following it, as well as the somewhat, somewhat  
20 analogous patent infringement context, that improving this  
21 reasonable license fee that results from the hypothetical  
22 negotiation, the jury may hear evidence that includes -- and  
23 here I'm quoting from *Safka*, "expert testimony, prior sales  
24 history and evidence of sales of comparable assets," which  
25 is to say other reasonably similar license agreements, and I

1 would cite the parties to *Safka Holdings* at 42 F.Supp.3d  
2 488, pin cite 493.

3 I would also virtually cite all of the cases cited  
4 by the parties in their various filings on this issue,  
5 including *Gaylord*, *M2M Solutions*, *Audio MPEG* and *Utah*  
6 *Medical*. Simply stated, the admission of other license  
7 agreements is as a general proposition well accepted.

8 In addition, each party, and/or their experts as  
9 appropriate, may introduce evidence of the kinds of  
10 considerations that would factor into such a hypothetical  
11 negotiation based on their knowledge and experience.

12 Finally, it is equally clear that neither party  
13 can put in evidence, nor have their lawyers argue: This is  
14 what I would have charged or what I would have paid for such  
15 a license. With those rules in mind, let me turn to the  
16 specific issues before the Court.

17 As to the settlement agreements between FICO and  
18 third parties, they are inadmissible. Third-party licenses  
19 are admissible to show the value of a license, but in the  
20 context of a settlement agreement, Rule 408 makes it clear  
21 that the agreement is inadmissible to prove the value of the  
22 claim, that is in that circumstance the license, since the  
23 offer may be motivated by a desire for peace, and those  
24 settlement agreements are therefore inadmissible. They're  
25 irrelevant as well as prejudicial because they may



1       improperly suggest to the jury the value of a claim.

2               And courts have routinely excluded such agreements  
3       to settle that involved licenses like these, and I would  
4       cite the parties to, among other things, *LaserDynamics* and  
5       *Uniloc*. So based on that, the following exhibits are  
6       excluded, and these are all plaintiff numbers.

7               So P424, 425, 430, 437, 439, 803, 810 and 812. I  
8       am reserving ruling on two exhibits that have been  
9       identified, P427 and P767. These agreements do not on their  
10      face indicate that they are settlements, and if FICO can lay  
11      proper foundation that they were the result of an arm's  
12      length negotiation that occurred not under the threat of a  
13      claim of breach or infringement, they are admissible.

14              Turning now to the admissibility of the  
15      third-party perpetual licenses involving FICO, FICO argues  
16      that because they are perpetual initial licenses, they are  
17      not economically comparable to the hypothetical license at  
18      issue here, and therefore they must also be excluded.

19              I agree with FICO that third-party licenses may  
20      only be admitted after a threshold showing that they are  
21      sufficiently comparable. From the cases the parties have  
22      cited, however, that level of comparability is not a high  
23      bar. It is not by any means the same as substantially  
24      similar.

25              Many of the cases are cited from the patent

1 context, and in the patent context, which is different, it  
2 requires sort of distilling those cases down. They seem to  
3 require that the licenses involve similar or same technology  
4 and be generally economically comparable.

5 So in this case, I find that the third-party  
6 licenses here meet the low threshold for admissibility and  
7 concern over their dissimilarities go to the weight of the  
8 evidence and are more than fair game for cross-examination.

9 Simply stated, they are licenses for Blaze Advisor  
10 between FICO and another entity. The fact that they are  
11 perpetual, rather than for a fixed term, is a more than fair  
12 field of inquiry by FICO, and FICO is more than free to  
13 admit testimony and evidence why the considerations that go  
14 into the hypothetical license negotiation are different from  
15 those that are involved in initial perpetual licenses like  
16 these.

17 I will also note that two of the licenses, as I  
18 read them, D172 and D281, do not appear to be perpetual  
19 licenses. So some further guidance to the parties. This  
20 issue or fight over actual damages has focused the parties a  
21 little bit more concretely, I think, on the standard for  
22 actual damages. I mentioned at the outset that the license  
23 fee is premised on the infringer's use, that is the license  
24 that is being negotiated for in the hypothetical  
25 negotiation.

1           And in order to avoid some of the disputes that  
2           have arisen, I am going to define now the scope or the  
3           license that is the subject of the hypothetical negotiation,  
4           and at the end of the case, this will be, or something,  
5           very, very close to this, will be the instruction to the  
6           jury.

7           The license that is the subject of the  
8           hypothetical negotiation is a one-time, enterprise-wide  
9           global license to use Blaze Advisor for internal business  
10          purposes in 15 applications for a period of three years by  
11          an insurance company with annual revenues of approximately  
12          30 billion. Let me just pause there so people can follow  
13          that, and I want to emphasize something that I just said.  
14          It's a one-time, three-year license.

15          So and that is the economic circumstance in which  
16          the hypothetical negotiation is occurring. So let me turn  
17          to the last issue about whether those license agreements may  
18          also be introduced as evidence of the meaning of the FICO  
19          Federal license, and I find that they cannot be.

20          I've reviewed the cases by Federal. They fall  
21          into two categories, I would say. Most of them involve  
22          evidence that or contracts between the two parties involved  
23          in the litigation.

24          The other case, which is the *Quadrant* case, really  
25          involves a different circumstance where the Court was

1       construing the meaning of a provision in a contract that had  
2       very discrete language and looked to how two other decisions  
3       by a court had interpreted very similar language that just  
4       omitted one word, and so this was not a circumstance where  
5       the jury was considering how do I interpret an ambiguous  
6       contract based on a whole variety of agreements, but rather  
7       the Court was applying interpretations of other courts as a  
8       matter of law to a very discrete set of or very discrete bit  
9       of language in a contract before it.

10               So I find that Federal's cases are inapposite, and  
11       FICO's cases generally establish the point that I think is  
12       accurate that parol evidence is, if not exclusively, then  
13       virtually exclusively, evidence of course of dealings  
14       between the two parties at issue in the litigation, which is  
15       not the case with the license agreements between FICO and  
16       third parties, and I would exclude those licenses or limit  
17       their admission to not prove the meaning of this contract.

18               And I would also say that that is based not only  
19       on what I have just said, but also on Rule 403 and the  
20       danger that this might confuse the jury or waste time or  
21       unfairly prejudice FICO. That said, obviously Federal is  
22       free to ask a witness, couldn't you have used language like  
23       such and such, not referencing the agreement, but you can  
24       use, couldn't you have used language like this.

25               And in that circumstance if the witness says, no,

1 we could not have or we never have, then, you know, it's a  
2 fair subject of impeachment, but the agreements may not be  
3 put in for that purpose, and I will consider giving a  
4 curative instruction or an instruction at the end of the  
5 case on that topic.

6 All right. That's the Court's ruling on those  
7 issues. Let me ask.

8 Mr. Hinderaker, any need for clarification?

9 MR. HINDERAKER: I think I understand. So from  
10 point of view of clarification, no. From the point of view  
11 of our factual evidence, some of the, some of the years of  
12 use of the application are more than three years, but so  
13 there is a -- there is an issue around that, limiting it to  
14 a three-year term.

15 THE COURT: Understood.

16 MR. HINDERAKER: Limiting it to a term I have no  
17 quarrel with. Limiting it to a certain -- the term limits  
18 should be in line with the evidence.

19 THE COURT: It should, and I will look to the  
20 parties to tell me what the term is. I think it should be  
21 the maximum term of any of the uses, so if it's four years,  
22 it's four years, if you're following what I'm saying.

23 And then I would say, I have described it as a 30  
24 billion dollar enterprise. Again, I'm looking to the  
25 parties to make sure that I have that right number. I think

1       you know what number I'm referring to.

2               Anything further on your side, Mr. Hinderaker?

3               MR. HINDERAKER: No, Your Honor. I understand the  
4       construct. I understand the Court's thinking, I think, and  
5       then it will conform with the evidence as it finally comes  
6       in in the trial.

7               THE COURT: Very well. And let me just before I  
8       turn to Federal for a second, let me just say a couple of  
9       things.

10              Ms. Kliebenstein's letter not last night but the  
11      one immediately previous to that, I just want to say  
12      contained a complete, accurate and fair summary and a clear  
13      understanding of what I had said, so I appreciate that. One  
14      other thing you guys should know. There is no way you would  
15      know this. We don't have access to Lexus. We have Westlaw,  
16      so if you cite Lexus cases, I can usually find them on  
17      Westlaw, but not always.

18              So if you do cite Lexus, if you wouldn't mind  
19      attaching a copy of the case, that would be helpful. Okay.  
20      Any questions or clarification by Federal?

21              MS. GODESKY: So we noticed the same thing  
22      Mr. Hinderaker raised about the term of the license. So we  
23      will think about that and come back to the Court. Just so  
24      it's clear, this hypothetical negotiation is in the context  
25      of willing buyer, willing seller, not someone under the

1 threat of copyright infringement if they're continuing to  
2 use the product.

3 THE COURT: Correct.

4 MS. GODESKY: Okay.

5 THE COURT: It is an arm length negotiation  
6 between a willing buyer and a willing seller, and so, yes.  
7 That context cannot under the law include the fact of threat  
8 of litigation or claim of breach, that one of the cases, and  
9 I believe it was *On Davis*, maybe it was one of the other  
10 ones, made it very clear that the infringer's use not  
11 accounting for the claim of infringement. Okay?

12 MS. GODESKY: And then, Your Honor, on the last  
13 issue you ruled on, this issue of introducing other license  
14 agreements to resolve the ambiguity in Section 10.8, we  
15 certainly --

16 THE COURT: You disagree. I understand.

17 MS. GODESKY: We disagree, yes, but I also think  
18 your ruling did not address another reason why these  
19 contracts are plainly admissible which is, the door has been  
20 opened. Mr. Hinderaker opened this case by declaring this  
21 is the standard FICO language, and then Ms. Boone came on  
22 the stand and said this is the standard 10.8 language, and  
23 this is its business purpose.

24 And so we have to be able to challenge that with  
25 evidence that shows, this isn't standard language. It's

1 different in, I mean, they produced hundreds of contracts.  
2 I have no intention of producing or entering into evidence  
3 hundreds of contracts, but we should be able to show there  
4 is nothing to prove that this is the standard Section 10.8,  
5 and the business purpose that they're describing is  
6 reflected in numerous other contracts that they regularly  
7 enter into and are completely distinct from the provision in  
8 this contract.

9 The door is open, and we have to be able to  
10 challenge this notion that this is standard and consistent  
11 with our standard business purpose.

12 THE COURT: I would, I would say this: I think  
13 you can challenge the notion that this is standard language.  
14 Okay? And to that extent, the agreements that come into  
15 evidence can demonstrate that it's not or the jury can  
16 decide whether it's standard language, but what it can't be  
17 used for is to say if, in order to interpret 10.8 in this  
18 contract, you need to consider the language of these 10  
19 other license agreements. That I think is beyond what the  
20 law allows, and so it's a very thin distinction.

21 But the license agreements, you know, I've said  
22 they come in for whatever use the jury decides to make of  
23 them in the hypothetical negotiation. I think you are free  
24 to say that the claim that this is standard language is  
25 belied by other evidence, but Mr. Hinderaker is more than



1 free -- I'll give you a second -- is more than free to say,  
2 you know, there is no evidence that it's not standard.  
3 There is just, we have a lot of agreements.

4 So I understand your point, but I don't think you  
5 can get from there to, and therefore, this is how to  
6 interpret 10.8 in light of the language of these other  
7 agreements.

8 MS. GODESKY: But they have their witnesses, Your  
9 Honor. We saw it with Ms. Boone, and I expect to see it  
10 from other witnesses testifying that we, we have a standard  
11 business purpose behind our assignment clauses, and the  
12 standard purpose is that if there is a merger or acquisition  
13 that results in more revenue, right, we have the ability to  
14 get more money through a license fee.

15 And the fact that there are numerous license  
16 agreements that actually say that, if there is a merger or  
17 acquisition that results in more revenue we have a right to  
18 get additional license fee, in contrast to the Chubb license  
19 agreement, that is completely probative of resolving the  
20 ambiguity in 10.8. They know how to negotiate that language  
21 in to serve the business purpose.

22 They didn't here, and the jury should be free to  
23 consider that.

24 THE COURT: Well, the problem with that I think  
25 is, you are assuming that that is -- you said they are free

1 to negotiate it, but there is no evidence that that's what  
2 was coming from FICO or that FICO thought that language  
3 meant anything different from what was in your agreement.

4 MS. GODESKY: Your Honor, that just goes to the  
5 weight of the evidence. That's fodder for  
6 cross-examination. If Mr. Hinderaker wants to elicit that  
7 type of testimony if it's true, that's absolutely fair game,  
8 but, you know, the jury is presented with this ambiguity.

9 Under New York law, extrinsic evidence that can  
10 resolve the ambiguity is absolutely fair game. There is,  
11 there is -- we've heard very little from witnesses in terms  
12 of, you know, the communications between the parties about  
13 what this provision meant. And so certainly if business  
14 purpose is, you know, more money if more revenue, and that  
15 language appears in certain contracts but not in ours,  
16 that's relevant to resolving the ambiguity.

17 They can challenge it. There is responses like  
18 the one that you just, I don't know, suggested, but to not  
19 let us probe this issue is, you know, completely carving out  
20 all of -- very relevant bucket of extrinsic evidence.

21 THE COURT: Go ahead, Mr. Hinderaker. Is this  
22 issue coming up with Mr. Carretta, do we think?

23 MR. HINDERAKER: Yes.

24 MS. GODESKY: Yes.

25 THE COURT: Okay.

1 MR. HINDERAKER: I think it starts to get off  
2 track with the word "standard." And as Ms. Boone said and  
3 her e-mail said, here is our standard contract, our specimen  
4 contract for Blaze Advisor. As the Court has already noted,  
5 New York law, the cases that we cite are clear that if  
6 you're going into parol -- if you're going to go into the  
7 interpretation of a contract, that has to be tethered to the  
8 parties to the case.

9 When -- and then as Ms. Boone testified, every  
10 contract -- and as counsel for defense has argued, every  
11 contract is unique. Every contract is the product of its  
12 own unique negotiation. Every client being motivated by  
13 that client's motivations. So to bring in other contracts  
14 unique to themselves, unique to their own motivations  
15 without any evidence of the, of that, those facts, one,  
16 we're contrary to the law because it's not relevant to the  
17 meaning of these two parties to this contract.

18 And secondly, it's a vehicle to create, without  
19 any factual support, lawyer argument, lawyer argument that  
20 in this contract this provision meant such and so without  
21 having any idea of what the parties to that different  
22 contract were trying to accomplish in their negotiations.

23 THE COURT: Well, all right. Understood. Go  
24 ahead and be seated, Mr. Hinderaker.

25 So, first of all, Mr. Carretta is not going to

1 testify to the meaning of 10.8, right?

2 MS. GODESKY: I believe Mr. Carretta is going to  
3 talk about the business purpose of 10.8, and he's going to  
4 echo what we heard. I have to say, Your Honor, the transfer  
5 fees they opened on standard. Ms. Boone's e-mail said  
6 standard. She testified about standard, you know. They've  
7 locked themselves into this position, and we have to be  
8 entitled to challenge it. I'm not talking about dozens of  
9 agreements.

10 THE COURT: I don't disagree with the notion.  
11 You're talking about cross-examination, and if the witness,  
12 yes, I agree that if the witness said this is standard  
13 language, the business reason behind this says this, it is  
14 fair cross-examination to say, you know, other language  
15 might express this business purpose in a different way or a  
16 clearer way, and in fact such language has been used in FICO  
17 contracts. That's fair.

18 What I'm -- that's all fair cross-examination in  
19 response to what the testimony is. What I'm saying is, you  
20 don't get to introduce these agreements to say, when you  
21 interpret 10.8 of this contract, you have to interpret it in  
22 light of this language. There is a difference there, and  
23 there is a line I'm drawing.

24 MS. GODESKY: I just think the one thing I will  
25 say is, under New York law, right, the doctrine of when

1     you're interpreting an ambiguity, the absence of words that  
2     are routinely used in other contracts is significant, and so  
3     what we should be able to argue to the jury at the end of  
4     the case is, look at these three or four agreements. They  
5     specifically said if revenue increases because of a merger  
6     or acquisition, we're going to renegotiate the license fee.

7             So, ladies and gentlemen, the fact that that  
8     language was not negotiated into the Chubb agreement, that  
9     says something. There is a significance to that.

10            THE COURT: All right. Well, I'm not sure any of  
11     the cases that Federal has cited support that. All of the  
12     cases that you have cited are involving language and  
13     differences in language between the same two parties, other  
14     than this *Quadrant* case. But the --

15            Go ahead.

16            MS. GODESKY: I think the *Starter Corp* Second  
17     Circuit case addresses one party's agreement with other  
18     companies, and I think that FICO's cases are inapposite. I  
19     mean, these are discovery dispute type cases. These are  
20     cases where you didn't have a party contending that they had  
21     a standard contract, right?

22            The Southern District of Ohio case was about a  
23     contract provision that was unambiguous. There is an  
24     ambiguity here, and New York law is clear. I mean, it's  
25     like the core principle of New York law. Once the Court

1 finds an ambiguity, extrinsic evidence has to come in.

2 THE COURT: It does.

3 MS. GODESKY: And this is absolutely probative  
4 extrinsic evidence.

5 THE COURT: And I think I've made it clear that  
6 you can, you know, first of all it springs off their  
7 testimony, and you have so far been allowed to cross-examine  
8 in exactly the manner you have suggested, right?

9 MS. GODESKY: Yes, and it wasn't objected to at  
10 the time so a reference to a curative instruction, I mean I  
11 would absolutely object to that because I walked through  
12 Ms. Boone's cross-examination very slowly. I didn't publish  
13 anything to the jury.

14 You asked Mr. Hinderaker if there was an objection  
15 to the one agreement we admitted. There was no objection.  
16 So there is definitely no basis for a curative instruction,  
17 and if we hear Mr. Carretta talking about, this is the  
18 business purpose behind the provision or this is our  
19 standard general language when it comes to assignments and  
20 mergers, I mean, I think I should be able to confront him  
21 not only with this general question of, isn't it true that  
22 in certain circumstances you used different language, but  
23 also show the jury a couple examples of that language.

24 These are contracts that were negotiated  
25 contemporaneously by folks in his legal department, and the

1       absence of this specificity in the Chubb agreement is  
2       meaningful, and it's certainly probative of trying to  
3       resolve the ambiguity.

4               I mean, the jury, like I said, you know, we  
5       haven't heard much from witnesses about conversations about  
6       this clause. So this is, this is relevant and probative.

7               THE COURT: I think what you and I are debating  
8       right now is not what happens when Mr. Carretta is on the  
9       stand so much as what happens in final argument.

10              MS. GODESKY: I think that's mostly correct,  
11       except I, I would like to be able to, if we hear what I'm  
12       anticipating, to do what I did with Ms. Boone and show him a  
13       couple agreements.

14              THE COURT: And I -- that is proper.

15              MS. GODESKY: Okay.

16              THE COURT: Okay?

17              MS. GODESKY: Thank you, Your Honor.

18              THE COURT: But it's, but it's a question of what  
19       he says, and it's also a question of how you frame your  
20       questions.

21              MS. GODESKY: Understood.

22              THE COURT: Okay.

23              Mr. Hinderaker, you have been very patient. Did  
24       you want to come up and address further?

25              MR. HINDERAKER: I would like to say this: What

1 we know from Judge Wright's order is that the extent that  
2 paragraph 10.8 has been found to be ambiguous is in the  
3 phrase, "And client shall make no expanded use."

4 And counsel is using the word "ambiguity" when it  
5 is specific to that element of 10.8 to try to make 10.8 into  
6 something that it's not.

7 This 10.8 in this license agreement is as written.  
8 There are various other license agreements where the parties  
9 negotiated various other terms that would be implicated upon  
10 a merger, upon an acquisition or upon some other event.  
11 Some clients had different motivations for what they wanted  
12 to be able to be free to do. FICO had to consider whether  
13 it was willing to agree to that.

14 Each of these negotiations is different, and none  
15 of the, none of the examples that counsel is arguing about  
16 are directed to that phrase, that element of 10.8 that has  
17 been found to be ambiguous. She wants the language of 10.8  
18 to read other than it does.

19 So I think the Court's -- none of these agreements  
20 should be in evidence, and just as Ms. Boone said, sure,  
21 license agreements are negotiated. Sure, the negotiations  
22 result in different terms. Not a surprise. Not a big  
23 revelation.

24 But then if you start to use other people's  
25 negotiations to beat up the meaning of this one between



1       these parties, when as far as I know, all of the evidence of  
2       the back and forth between these parties and 10.8 is already  
3       in evidence, the red lining between Mr. Black and Ms. Boone.

4               THE COURT: And wasn't, if I might just say, it  
5       wasn't terribly illuminating, frankly.

6               MR. HINDERAKER: Because there wasn't any real red  
7       lining -- there wasn't any negotiations to 10.8 other than  
8       adding "shall not be unreasonably withheld."

9               THE COURT: I understand, but the  
10       cross-examination we're describing is fair game depending on  
11       what the witness says whether -- and showing those exhibits  
12       as part of the impeachment is fine. Whether what limits, if  
13       any, will be placed on the final argument we'll address  
14       further on down the road.

15               And I will look back at your cases again, but I  
16       don't -- I did not read the Second Circuit case the way you  
17       did. So I will go read it again.

18               MS. GODESKY: So will I. Your Honor --

19               MR. HINDERAKER: And the ruling stands that -- the  
20       ruling stands today that those third-party agreements are  
21       not admitted into evidence.

22               THE COURT: Well, they're admitted into evidence  
23       as to the hypothetical negotiation. They're relevant to --

24               MR. HINDERAKER: Yes. As to the --

25               THE COURT: And they can be used to, as

1 cross-examination of the witness, depending on what the  
2 witness says. For the moment, they're not going to be used  
3 to argue that the meaning of this is what's in these  
4 agreements.

5 MR. HINDERAKER: As opposed to wasn't.

6 THE COURT: What? Go ahead.

7 MS. GODESKY: I will make one last point in  
8 response to Mr. Hinderaker. So he pointed out this  
9 ambiguity with the phrase "expanded use." Everyone agrees  
10 that is ambiguous.

11 THE COURT: It precluded summary judgment. Beyond  
12 that --

13 MS. GODESKY: The definition I used with Ms. Boone  
14 had expanded use. And we're going to lock it in the day  
15 before the merger, and if you're increasing the number of  
16 applications, that would be expanded use. So that is  
17 absolutely an example of how these other agreements resolve  
18 ambiguities, because we're going to hear from FICO that the  
19 measure of expanded use is the number of writing companies  
20 running through these computer applications.

21 I should be able to argue the way that FICO  
22 measures expanded use in its day-to-day business operations  
23 as reflected in these other agreements is the number of  
24 computer applications using Blaze. That should be fair  
25 game, and it should be admitted into evidence.

1 MR. HINDERAKER: As Your Honor has already noted,  
2 it's not parol evidence. It's not admissible as parol  
3 evidence. It's not admissible as to the meaning of this  
4 contract. It's not between the parties.

5 MS. GODESKY: We just fundamentally disagree with  
6 that because there is an ambiguity, and as I've, you know,  
7 as I've said over and over, the fact that FICO is defining  
8 expanded use in a particular way with other parties buying  
9 Blaze is absolutely relevant to how we're going to measure  
10 expanded use.

11 THE COURT: Understood. For the moment, we're  
12 just going to proceed in the manner I have suggested. The  
13 agreements can be used to cross-examine the witness, and you  
14 can certainly make those points in your cross-examination.

15 MS. GODESKY: Understood. Thank you.

16 THE COURT: All right. We're in recess.

17 **(Lunch recess taken.)**

18 **1:35 p.m.**

19 **IN OPEN COURT**

20 **(JURY NOT PRESENT)**

21 THE COURT: Good afternoon. Be seated.

22 All right. Good everyone, everyone.

23 Before we bring the jury in, I did take the noon  
24 hour to reread *Starter Corp* and *Borne*, the case underlying  
25 it or the case that *Starter* cites to, and I just think

1       that -- I think I've got it right.

2               The extrinsic evidence to prove the plural  
3       possessive parties' intent in those cases involved letters  
4       and course of dealings and agreements between the parties.  
5       And that makes sense to prove the parties' intent in a  
6       particular agreement.

7               And the problem with using FICO's agreements with  
8       others is, they don't necessarily or we don't have the same  
9       context for saying this is the parties', plural possessive,  
10      intent in this case.

11              So you're welcome, if you find cases in which  
12      extrinsic evidence is of this nature, by all means, call  
13      them to the Court's attention.

14              As I've indicated, you are, you are free to use  
15      these in cross-examination, but I don't think that they are  
16      extrinsic evidence of the parties' intent as to 10.8.

17              MS. GODESKY: Thank you.

18              THE COURT: Okay. Before we bring the jury in,  
19      anything else we need to deal with?

20              MR. HINDERAKER: No, Your Honor. I don't know how  
21      long cross will be. The direct will be an hour plus,  
22      probably. As a courtesy, Mr. Carretta is a San Diego  
23      resident. I think his flight time tonight is like -- I'm  
24      not sure -- about 7-ish.

25              THE COURT: Okay.

1 MR. HINDERAKER: So I'm hopeful we can finish him.  
2 I am hopeful we can get to the next witness, but in terms of  
3 scheduling, I hope we can at least finish Mr. Carretta.

4 MS. GODESKY: I would be surprised if we don't.

5 MR. HINDERAKER: Very well. Glad to hear.

6 THE COURT: Very well.

7 1:38 p.m.

8 **IN OPEN COURT**

9 **(JURY PRESENT)**

10 THE COURT: Be seated.

11 Mr. Hinderaker, call your next, if you would.

12 MR. HINDERAKER: Your Honor, FICO calls Thomas  
13 Carretta.

14 THE COURT: Come on up, Mr. Carretta. Well, if  
15 you will just stop and raise your right hand.

16 THE WITNESS: Yes, sir.

17 THOMAS CARRETTA,

18 called on behalf of the plaintiff, was duly sworn, was  
19 examined and testified as follows:

20 THE WITNESS: I do, sir.

21 THE COURT: Go ahead and be seated and state your  
22 full name for the record. Make sure you speak into the mic.

23 THE WITNESS: Thomas Frank Carretta.

24 MR. HINDERAKER: These are exhibits that we will  
25 be using today, and you will see they are tabbed.

DIRECT EXAMINATION

BY MR. HINDERAKER:

Q. Good afternoon. We know that you are retired from FICO.  
When did you retire?

A. December 16th of 2020.

Q. Happily retired?

A. Yes.

Q. What was your job at FICO or your job title before  
retirement?

A. Vice president legal and deputy general counsel.

Q. And how many years did you have that position?

A. I was hired as vice president legal, we didn't have that  
other title, back when I joined in June of 2005.

Q. Okay.

A. And then sometime later, I don't remember when.

Q. Sometime later the responsibilities increased?

A. A little bit, yes.

Q. For how much of that time -- well let me ask this:

During your time and your duties at FICO, did you have  
responsibility for the, for transactions, for contracting,  
for license agreements?

A. Yes. I was responsible for team folks that we managed  
the transactions.

Q. Tom, the mic goes up and down.

1 A. Okay.

2 Q. And I hit it too much. So if you would speak into it,  
3 we can all hear better.

4 A. Okay.

5 Q. So you were saying you were what?

6 A. I was responsible for a team of lawyers and myself, and  
7 we managed the commercial transactions for the group.

8 Q. And how many lawyers were in your team?

9 A. I think at the time -- it ebbed and flowed, but it was  
10 approximately 18 lawyers and 6 or 7 paralegals.

11 Q. For how many years did you lead the transactional group  
12 at FICO?

13 A. My entire career at FICO.

14 Q. Had you had experience with software licensing before  
15 FICO?

16 A. Yes, I have.

17 Q. And could you summarize that for us please.

18 A. Yes. I practiced at a small group of computer  
19 companies, hardware and software, for about ten years. Then  
20 went to a privately owned company in Mankato, CWC Computers  
21 now known as Fire Pond or changed its name to Fire Pond,  
22 went to be a public company through that process of an  
23 initial IPO in 1999, 2000 period.

24 And then I moved to ReTech, which is located right  
25 here in Minneapolis or was at the time. I worked there

1 about five years before it was sold to Oracle, and then I  
2 moved immediately over to Fair Isaac Corporation or known as  
3 FICO.

4 Q. And what was the business of ReTech?

5 A. ReTech was an enterprise software company that supported  
6 large retailers, so clients like Best Buy, Target, most of  
7 the major big retail, retailers.

8 Q. You were a lawyer at ReTech.

9 A. Yes, I was general counsel at ReTech.

10 Q. And in that role had responsibility for the licensing  
11 transactions, the contracting transactions of ReTech?

12 A. That is correct.

13 Q. And prior to ReTech, Fire Pond, you were a lawyer at  
14 Fire Pond as well?

15 A. That's right. I was general counsel at Fire Pond as  
16 well.

17 Q. And what were your responsibilities at Fire Pond with  
18 respect to contract transactions, licensing transactions?

19 A. I was responsible for that process.

20 Q. And I forgot to ask you. What was the business of Fire  
21 Pond?

22 A. Fire Pond manufactured something called a configurator.  
23 It was an enterprise piece of software that was -- our  
24 primary customers were people like John Deere, Peterbilt  
25 Trucks, anything with big wheels on it, General Motors, to



1 enable them to identify the product the customer wanted to  
2 buy, like a Peterbilt truck.

3 And they have 50,000 options, and they would sort  
4 through all those options and eliminate things that you  
5 couldn't buy and then add things that you should buy. So if  
6 you were buying a truck to go over the mountains, you have  
7 bigger brakes, bigger radiator, that kind of thing.

8 Q. Let's go a little further back in time before your  
9 involvement in the software industry and licensing. Tell us  
10 your educational background, where you grew up, where you we  
11 want to school.

12 A. Sure. Born in Los Angeles. I went to Loyola Marymount,  
13 a Jesuit school in Los Angeles. My background was an  
14 English literature major. After I graduated there in 1980,  
15 I moved to Minneapolis and lived here up until August of  
16 last year.

17 Oh, sorry. I should say, and I went to Hamline  
18 University Law School.

19 Q. I'm glad you graduated from law school.

20 A. Yes, graduated in 1983.

21 Q. In the binder is a document that's called J1. Can you  
22 find that please.

23 A. Yes, I see it.

24 Q. And do you recognize that as the license agreement  
25 between FICO and Chubb & Son?

1 A. I do.

2 Q. All right. Did you have any, did you have any direct  
3 role in the drafting of this agreement?

4 A. No, I did not.

5 Q. When did you first become aware of this agreement?

6 A. It would have been in the latter portion of 2015.

7 Q. And why did you become aware of it?

8 A. I worked -- in my role, I interface a lot with  
9 salespeople, all the way from the executive vice president  
10 who is responsible for global sales to the regional managers  
11 and so on. So I became familiar with gentleman named Russ  
12 Schreiber and Mike Sawyer who came to me to ask some  
13 questions about this agreement, like I said late.

14 Q. What were the questions that they asked?

15 A. They had become aware that there was a potential merger  
16 that had been announced between the entire organization of  
17 Chubb with a Swiss company called ACE. Those aren't the  
18 proper names, but Chubb Corporation. And they wanted to ask  
19 some questions about the agreement.

20 Q. And in particular, do you recall in particular what the  
21 questions were they had about the agreement?

22 A. Yes. It was primarily what happens because of the  
23 merger, and so therefore I looked at this particular  
24 agreement.

25 Q. And is there a particular paragraph that was pertinent

1 to that question?

2 A. There's one particular paragraph that's on point, which  
3 was Section 10.8, but I read the entire agreement as well.

4 Q. Okay. And what did you, what did you tell Mr. Schreiber  
5 and/or Mr. Sawyer about what they should do?

6 MS. GODESKY: Objection.

7 THE COURT: Let's approach, Counsel.

8 (Sidebar discussion)

9 MR. HINDERAKER: I think he's going to say I told  
10 them to call the client.

11 THE COURT: Okay. And it's your, just want to be  
12 clear, that's not legal advice as far as you are concerned.

13 MR. HINDERAKER: I see what you are saying. I  
14 took it as just a fact of what he did.

15 THE COURT: Okay.

16 MR. HINDERAKER: But, yeah, but I suppose --

17 MS. GODESKY: I mean I didn't know what he was  
18 going to say.

19 MR. HINDERAKER: No, I'm not quarreling why we're  
20 having the conversation, but you know, it does lead up to  
21 transparency. It does lead up into, you know, the fact they  
22 had been contact yet, and so I will ask Carretta his  
23 understanding had they been contacted yet, and he will say  
24 not to my knowledge.

25 THE COURT: That's all fine. Yeah. Yeah.

1 MS. GODESKY: I mean, I think that's okay, but  
2 he's --

3 MR. HINDERAKER: It's not for legal advice.

4 MS. GODESKY: But it is. This is information that  
5 Sawyer and Schreiber apparently told him in the process of  
6 asking for legal advice. So if we're disclosing some of the  
7 things that they're telling him, like we haven't yet been  
8 contacted by Chubb, here's the situation, it starts to go  
9 into the whole sword/shield issue because they're  
10 withholding a lot of communications between Mr. Carretta and  
11 Mr. Sawyer and Schreiber.

12 And so, you know, I think Mr. Sawyer and  
13 Mr. Schreiber were asked about their communications with  
14 Chubb at their depositions, and those facts are properly  
15 established through --

16 THE COURT: They're already in evidence.

17 MR. HINDERAKER: And he'll tie it up win the  
18 context of the thing he did, which was prompt them to do it.

19 THE COURT: I don't think that's legal advice. I  
20 understand your concern, and it's, you know, again be very  
21 careful. And I know you want to be very careful.

22 MR. HINDERAKER: One step at a time.

23 THE COURT: Right.

24 MS. GODESKY: Okay.

25 (In open court)

1 BY MR. HINDERAKER:

2 Q. I'm going to ask you this question first. To your  
3 knowledge, had Schreiber or Mr. Sawyer been contacted by  
4 Chubb & Son regarding the announced merger?

5 A. I don't know. All right. So I'll repeat I don't know.

6 Q. All right. And what did you tell them to do regarding  
7 contacting the client?

8 A. I told them I would read the announcement that they had  
9 talked about and would read the agreement and get back to  
10 them.

11 Q. Get back to Sawyer and Schreiber?

12 A. That's correct.

13 Q. Okay. I would like to go to, if I might go to in your  
14 tab what is Exhibit 90.

15 A. Okay.

16 Q. And would you identify, identify Exhibit 90 for us  
17 please.

18 A. Exhibit 90 is a letter I wrote in January. It's dated  
19 January 27th of 2016, regarding a notice of breach of the  
20 agreement that we just referred to, and it's written to the  
21 general counsel of the Chubb Group, Mr. Joe Wayland, Joseph  
22 Wayland.

23 Q. All right. I'd like to go through what you wrote in  
24 this agreement.

25 So let's start with, if we might, let's start with

1 the third paragraph.

2 And you say to him, "I am writing now to again  
3 confirm the agreement may not be transferred or assigned  
4 without FICO's consent." I'll continue on but let me stop  
5 at that point.

6 Why do you say, "I am writing now to again  
7 confirm"?

8 A. Because prior to this point in speaking with Mike Sawyer  
9 and Russ Schreiber, after I did some review, I asked them to  
10 go back to the business, their contacts at Chubb, Chubb &  
11 Sons, and tell them you should be aware this agreement is  
12 out there, obviously, because they'd purchased and been  
13 using the software, but that there's a particular clause  
14 that is involved when there is a merger or acquisition such  
15 as what was described.

16 Q. So that explains the "again."

17 "Confirm that the agreement may not be transferred  
18 and assigned without FICO's consent and that FICO has not  
19 and does not consent to such transfer and agreement."

20 Is that a reference to paragraph -- well, what  
21 were you referring with that sentence?

22 A. I was referencing Section 10.8 of the agreement that is  
23 J001.

24 Q. Okay.

25 A. That's the license agreement. And pointing out that,

1       you know, we had not consented, just to be very clear, and  
2       that we were not consenting to the transfer and an  
3       assignment.

4       Q.   Are you referencing the first sentence in 10.8 in that  
5       regard?

6       A.   I very much am.

7       Q.   And at this point did you have any information from  
8       Chubb & Son with respect to the facts underlying the  
9       acquisition or any facts relating to the acquisition?

10      A.   Well, when I saw the announcement, I read it, and I'm  
11      experienced in mergers and acquisitions through the course  
12      of my career, and so I understood the process. So I read  
13      the announcement. I knew the announcement was simply that,  
14      it was an announcement that they had signed the agreement,  
15      but that these take time to close. And actually the merger  
16      be completed.

17                So I read that, and because it was such a large  
18      merger and Chubb Corporation was an American public company,  
19      so it files with the Securities Exchange Commission reports  
20      and things, I was able to read some of the filings.

21                And between those activities and reading the  
22      agreement, it became clear to me to tell Russ Schreiber and  
23      Mike Sawyer they should go back to their business contacts  
24      before the merger was completed.

25                You can never tell when these mergers are going to

1 complete and close.

2 Q. Okay. And then this letter January 27th is after the  
3 merger was completed, correct?

4 A. Yes, it is.

5 Q. All right. And so you're saying in that first sentence:  
6 "FICO has not and does not consent."

7 And then let me go to the second sentence of your  
8 third paragraph. "The agreement plainly states in  
9 Section 10.8 that the agreement may not be assigned without  
10 consent," and it goes on.

11 "A change of control or merger and acquisition of  
12 Chubb was also stated as being a deemed assignment requiring  
13 consent."

14 And what are you saying there when you say "was  
15 also"?

16 A. Well, there's -- the way Section 10.8 was structured --

17 MS. GODESKY: Objection.

18 THE COURT: Sustained. Why don't you rephrase it  
19 or --

20 Mr. Carretta, you can answer the question that was  
21 asked. You cannot provide testimony about your  
22 interpretation of the contract. Okay?

23 THE WITNESS: Okay.

24 BY MR. HINDERAKER:

25 Q. So my question is why did you say, why did you say what



1       you said, "A change of control or merger and acquisition of  
2       Chubb was also stated"?

3       A. Well, 10.8 is a commercial clause. It sounds legal, but  
4       it's a commercial clause. And I simply looked at it, and in  
5       a commercial perspective, it says, "No assignment unless you  
6       obtain consent."

7       Q. And so let's be careful and we'll just stay with your  
8       understanding of the provision and why you wrote what you  
9       wrote.

10               So let me focus you then on the second sentence of  
11       10.8.

12       A. That's a direct reference to the agreement.

13       Q. That, that being, that being that the language in your  
14       letter, "A change of control or merger and acquisition of  
15       Chubb was also stated as being a deemed assignment requiring  
16       consent"?

17       A. That is correct.

18       Q. Okay. So that language in your letter is a reference to  
19       the second sentence of paragraph 10.8?

20       A. That's right. I was simply mimicking what's in the  
21       clause.

22       Q. As you wrote this letter saying Notice of Breach, in  
23       your understanding, when was the request for FICO's prior  
24       written consent to have happened?

25               MS. GODESKY: Objection.

1 THE COURT: Sustained.

2 BY MR. HINDERAKER:

3 Q. Why did you think that -- why did you think that Chubb &  
4 Son was in breach?

5 MS. GODESKY: Objection.

6 THE COURT: Rephrase the question.

7 BY MR. HINDERAKER:

8 Q. Why did you write a letter that says Notice of Breach to  
9 Chubb & Son?

10 MS. GODESKY: Objection.

11 THE COURT: Overruled.

12 THE WITNESS: I wrote the letter because the  
13 merger had closed, and therefore it became important to  
14 provide information and notice to their counsel that they  
15 had either overlooked this issue or they should be very  
16 aware of it because it's important.

17 BY MR. HINDERAKER:

18 Q. I think I understand that. My question was a little bit  
19 different. Why did you write a letter that says Notice of  
20 Breach?

21 A. Well, because --

22 MS. GODESKY: Objection.

23 THE COURT: Let's approach again.

24 (Sidebar discussion)

25 THE COURT: He wrote what he wrote.

1 MS. GODESKY: Sure. And he can read what he wrote  
2 but why --

3 THE COURT: No, he can say -- he can go beyond  
4 that. He can say because I thought they were in breach or I  
5 was putting them on notice that our position was they were  
6 in breach. That doesn't --

7 MR. HINDERAKER: We're defending against a claim  
8 that he acted in bad faith, and he, in my judgment, should  
9 be able to explain why he thought he wasn't, what he  
10 understood that -- it doesn't. He's not tell the jury what  
11 the contract means, but what he understood and why he was  
12 doing what he was doing, so we can defend the bad faith  
13 claim.

14 MS. GODESKY: He should be defending a bad faith  
15 claim with evidence other than lawyer's interpretation of  
16 the contract.

17 MR. HINDERAKER: It's not that.

18 MS. GODESKY: If we could have had lawyers as a  
19 mouthpiece interpreting this contract, this case would be  
20 very different. We'd have lawyers from ACE and Chubb all  
21 marching up and taking the stand and talking about their  
22 interpretation of the clause at the time it was negotiated,  
23 their interpretation of Mr. Carretta's breach letters, why  
24 they disagreed with the breach.

25 That's not how you try cases. This is work

1 product. This is attorney-client communications, and  
2 they're selectively waiving it as they so choose, but he was  
3 instructed over and over at his deposition not to answer  
4 questions about what does "expanded use" mean in  
5 Section 10.8.

6 They don't want him to answer that question, but  
7 he's allowed to say I believe that they were in breach when  
8 he's been instructed not to answer questions about how he  
9 interprets "expanded use"?

10 THE COURT: Yeah. How -- so if he is not entitled  
11 to -- I mean, he's the person that gave the notice of the  
12 breach. How is FICO to defend the bad faith claim if not, I  
13 wrote it, I meant it, this is, you know --

14 It's a very difficult line. I will give you that,  
15 but I'm not so sure that, you know, he's not asking him, you  
16 know, what does this provision mean, et cetera, et cetera.

17 MS. GODESKY: Well, they could defend the bad  
18 faith claim by having -- everyone keeps telling us it's a  
19 commercial clause, right? They could have their business  
20 people testify about how this was all done in good faith on  
21 their end because their interpretation of Section 10.8 and  
22 its business purpose is XYZ.

23 But if their defense to our bad faith claim is  
24 going to be, our lawyer read the agreement and found a  
25 breach, that's an advice-of-counsel defense, and we would

1 have been entitled to all of Mr. Carretta's memos and emails  
2 with Mr. Sawyer and Schreiber.

3 THE COURT: Well, they're not going to get to  
4 argue that FICO relied on the advice of their counsel.

5 MS. GODESKY: Right. But that's what's happening  
6 when you call the counsel here, and he's, you know, with the  
7 gravitas of a lawyer saying, well, I reviewed the contract  
8 and I thought it was in breach.

9 MR. HINDERAKER: Any time for me?

10 THE COURT: Yeah, please.

11 MR. HINDERAKER: Yeah. Thank you.

12 One, we've been through this argument before in a  
13 motion in limine. You gave us instructions about what a  
14 lawyer can say and not say.

15 THE COURT: Right.

16 MR. HINDERAKER: And Mr. Carretta is a fact  
17 witness in the sense that he's the one that wrote the  
18 letters. He's the one that received the letters from the  
19 counter counsel at Chubb, and we're going to go from this  
20 letter to a couple other communications between he and  
21 Mr. Hopp, who is the other lawyer.

22 We're going to jump past all of the 408 time, and  
23 we're going to go to the notice of termination letter, which  
24 he wrote as well. So the notion that we should get a bunch  
25 of lawyers in here and just argue what the contract means

1 that are unconnected to the dispute and are not witnesses is  
2 wrong.

3 And so having, having been through this once  
4 already with the motion in limine, personally I'd appreciate  
5 just I'll walk a very fine line. I'll ask him what's in his  
6 mind, why he did it and try to get through this.

7 THE COURT: And let me give what I think is a line  
8 that is appropriate. Why did you say this? Because I  
9 thought they were in breach.

10 MR. HINDERAKER: And I say why did you think they  
11 were in breach?

12 THE COURT: That I think crosses the line or  
13 what -- I think you can say -- I don't, I think he can say I  
14 thought they were in breach. I believe they breached this  
15 section and that section. But I don't think he can answer  
16 the "why" question, why do you think they were in breach.

17 MR. HINDERAKER: Okay. I'll ask him, did you  
18 believe they were in breach. Not why did you believe that.  
19 What made you think that.

20 THE COURT: Right, or what do you think they  
21 breached.

22 MR. HINDERAKER: What do you think they breached.  
23 I'll ask that.

24 MS. GODESKY: What section do you think they  
25 breached.

1 THE COURT: What section, yeah, right, what  
2 section.

3 MS. GODESKY: Then he can identify the section,  
4 and that's it.

5 THE COURT: Right. Not because they made expanded  
6 use or because they did this. Just I felt they were in  
7 breach of Section 3.1, 10.8.

8 MR. HINDERAKER: And I can say you felt that on  
9 January 27th.

10 THE COURT: Say that again?

11 MR. HINDERAKER: And I can say and you felt that  
12 on January 27th, 2016, the date of the letter.

13 THE COURT: Yeah, of course.

14 MR. HINDERAKER: Yeah, so let me -- I'm not sure I  
15 think this is quite the fair line, but I'm going to try to,  
16 what did you say, what caused you to say that.

17 THE COURT: Right.

18 MS. GODESKY: What caused you to say that, you  
19 know that's so open ended. I think the question is meant to  
20 be almost more leading. Did you say, was this because you  
21 thought they were in breach, and he can answer yes. But  
22 why, you know, what caused you to say that, well you know  
23 there had been an acquisition and --

24 THE COURT: Right. I do think the more you lead,  
25 the better this will come in.

1 MR. HINDERAKER: I'm happy to lead him through it.

2 THE COURT: Okay.

3 MR. HINDERAKER: I don't want to be up here every  
4 moment with a leading objection.

5 THE COURT: You won't be.

6 (In open court)

7 BY MR. HINDERAKER:

8 Q. Okay. We can hear you, right?

9 A. Yes.

10 Q. All right. Your letter is dated January 27, 2016. Fair  
11 to say you wrote the letter on that date because, to your  
12 knowledge, FICO had not received a request for consent?

13 A. That's correct. And they hadn't responded to Russ  
14 Schreiber and Mike Sawyer either.

15 Q. And in this letter you were giving Mr. Joseph Wayland  
16 notice of breach of paragraph 10.8, correct?

17 A. That is correct.

18 Q. Now, so we talked about the sentence where you say, "A  
19 change of control or merger and acquisition of Chubb was  
20 also stated as being a deemed assignment requiring consent."

21 That was a reference to the second sentence of  
22 paragraph 10.8, correct?

23 A. Yes.

24 Q. And then in your letter to, in this letter, you also  
25 reference other sections of 10.8, one of them being



1 paragraph 2.1. Agreed?

2 A. Yes.

3 Q. And if you look at paragraph 2.1, that provision of the  
4 license agreement says, "Subject to the terms, conditions  
5 and limitations of this agreement, Fair Isaac hereby grants  
6 to client a perpetual subject to the provisions of Article  
7 9, nonexclusive, non-transferrable license."

8 Was that -- was that your reference to  
9 Section 2.1?

10 A. Yes.

11 Q. And then if we go to Section 2.2, it also says, this one  
12 is entitled License to Documentation. "Subject to the  
13 terms, conditions and limitations of this agreement,  
14 Fair Isaac grants to client a perpetual nonexclusive,  
15 non-transferrable limited license."

16 Was that your reference to paragraph or to  
17 Section 2.2 in your letter?

18 A. Yes.

19 Q. And then you also reference paragraph 3.1. And 3.1  
20 sub-Roman v, small v, says, "Client represents and warrants  
21 that and its employees shall not assign, sublicense, lease,  
22 transfer or distribute."

23 Was that your reference in your letter to Section  
24 3.1?

25 A. Yes.

1 Q. And then you conclude saying, "Further, the license was  
2 personal to Chubb having been granted to Chubb & Son the  
3 defined client under Sections 2.1 and 2.2."

4 And that was an explanation of the license  
5 agreement that you also provided.

6 A. That's right. Correct.

7 Q. On the top of the next page you say, "Chubb Limited is  
8 making use after this notice by FICO of the requirement for  
9 consent constitutes Chubb and Chubb Limited as intentional  
10 infringers under applicable copyright and patent laws, in  
11 addition to being a breach of the agreement."

12 Now, with respect to that sentence, you identify  
13 both Chubb and Chubb Limited. Why?

14 A. Because the merger had already closed, and so because of  
15 that event having happened, the prior clause 10.8 became  
16 operative.

17 MS. GODESKY: Objection.

18 THE COURT: Sustained.

19 THE WITNESS: Let me restate that, if I can.

20 The merger closed. A new party owned the  
21 business.

22 BY MR. HINDERAKER:

23 Q. And so when you reference Chubb Limited, is that a  
24 reference to the new entity?

25 A. That's right. Chubb Limited at that moment was the

1 combination of the two companies, with Chubb Limited being  
2 the Swiss group primarily that owned the company.

3 Q. Okay. And when you, when you use the word "Chubb" in  
4 the sentence, is that a reference to Chubb & Son, the  
5 client?

6 A. Yes, because at the beginning of the letter I had  
7 defined Chubb & Son as Chubb. It's a bit confusing.

8 Q. Well, we're trying to sort it out.

9 In the next sentence -- well, let me back up. The  
10 notice that you're giving is the notice of breach, and as a  
11 consequence of the notice of breach, you're telling your  
12 counter party no further use of Blaze Advisor is  
13 appropriate.

14 A. That's right.

15 Q. The next sentence says, "FICO lacks sufficient  
16 information to understand the full implications of Chubb  
17 Limited's plans." Why did you add that to your letter?

18 A. From a business perspective, we needed, we didn't  
19 understand anything more than what I had already read from  
20 the public filings, and we hadn't gotten any feedback from  
21 Chubb & Sons before the closing of the merger.

22 And so we were asking for information, because  
23 they were our client, they were a good client, we wanted to  
24 be able to understand what they intended to do as this big,  
25 big organization. And so I was simply asking them, you

1 know, to provide that information to us so that we could  
2 consider how our futures would work out together.

3 Q. And if that information came, it would have gone to the  
4 business people?

5 A. Yes.

6 Q. Anyway, you didn't get it?

7 A. I didn't get it, no.

8 Q. Okay.

9 A. Maybe I misunderstood what you said, Al.

10 Q. No. No. I meant you're asking for -- you're saying we  
11 lack sufficient information. You knew that. And you're  
12 asking for getting some information to be more transparent  
13 to make an informed concept.

14 A. That's right.

15 Q. And if that -- the transmission of that kind of  
16 information would have gone to the FICO business people  
17 rather than to yourself in all likelihood?

18 A. That's right.

19 Q. And then in the paragraph Lacks Sufficient Information,  
20 you go on to say, "FICO is unable to accommodate any request  
21 now for consent. We are aware, of course, of the much  
22 larger entity as a result of the merger."

23 And is that a reference to what? That's a  
24 reference to Chubb Limited, the new larger entity?

25 A. Yes.

1 Q. And you go on to say, "And how allowing the license  
2 transfer will expose FICO to adverse impact based on the  
3 expanded risks of IP indemnity of a larger organization."

4 What was that about? Why did you say that?

5 A. IP indemnity literally means intellectual property  
6 indemnity. It means FICO represented earlier that we owned  
7 the software and we had the right to license the software.  
8 Software is covered by copyright law. And one of the rights  
9 under copyright law is, you control who you sell to and  
10 other bundles of rights.

11 And we needed to understand, when an indemnity  
12 means is if a third party decides to sue Chubb Limited or  
13 Chubb & Sons, we would have to indemnify, provide defense  
14 against those intellectual property claims, to prove in fact  
15 we owned the software and to shelter or protect the Chubb  
16 organization from those claims.

17 That's part of the bargain that we made with  
18 Chubb. It's absolutely typical in the software industry.

19 Q. And so you are saying, given that the IP is now inside  
20 of a larger organization, that meant what to you?

21 A. Well, we knew that Chubb Corporation owned Federal and  
22 it had a division called Chubb & Sons. As a result of the  
23 merger, Chubb Limited owned Federal and Chubb & Sons. And  
24 it was a completely different entity.

25 Q. Okay.

1 A. So we didn't want to be exposed to this very large  
2 entity. Again, we didn't know what they were planning to do  
3 with the software.

4 Q. Understood then. And you go on in the same paragraph,  
5 "Additionally the original enterprise license was based on  
6 Chubb & Son only, not the much larger organization which has  
7 breath well beyond Chubb & Son."

8 A. That's correct.

9 Q. Okay. Now does that -- did you say that because of the  
10 second sentence in paragraph 10.8?

11 A. Yes. And additionally, it's important to understand,  
12 and you see it in the first part, Section 2.1, that Chubb &  
13 Sons bought license number one. Then they expanded the  
14 license to number two, and then they bought it for number  
15 three, which each time gave them more and more rights.

16 And that's just the nature of how software is  
17 sold. You can buy small or you can buy big. So it was  
18 important to reference it again from a commercial  
19 perspective.

20 Q. So then on the second full paragraph on page 2, "While  
21 FICO will consider licensing its IP to Chubb Limited, please  
22 understand that it is not acceptable or agreed that Chubb  
23 Limited may use, make use of FICO's IP."

24 So that's -- you gave that notice in your breach  
25 of, in your notice of breach letter?

1 A. That is correct.

2 Q. And then you go on, "Further, FICO retains the right to  
3 terminate the agreement, and nothing contained herein is to  
4 be construed as a waiver of damages or the right to  
5 terminate the agreement."

6 Have I read that right?

7 A. That's right.

8 Q. So here you are giving notice of not acceptable to use,  
9 no waiver of damages. And then in the next sentence you  
10 say, "We understand that this was a large transaction and  
11 this may have been an oversight."

12 Why did you say that?

13 A. Again, from my merger and acquisition experience,  
14 there's a lot going on. There are tons of lawyers. There's  
15 tax accountants. There's all these people looking at a lot  
16 of different things, and this was a very big merger.

17 So therefore, it would have been possible that  
18 they simply missed it, made a mistake, or equally possible  
19 that they saw it and just decided to do nothing. Either  
20 way, I wanted to point it out that it could have been a  
21 mistake, let's talk about it. If you want us to make a  
22 decision as to what to do, just inform us so that we can  
23 decide whether to consent or not.

24 Q. Okay. And then in the next sentence you say, "While  
25 FICO does not waive its right to terminate the agreement

1 immediately under Section 9.2C or otherwise waive any  
2 rights, FICO is mindful of the long business relationship."  
3 I'll go that far.

4 So your letter on the one hand is saying, this  
5 could have been an oversight, and on the other side is  
6 saying the very same sentence, "We do not waive our rights  
7 to terminate."

8 Can you explain that?

9 A. The -- the event of the merger was a defining moment,  
10 and at that point the business relationship changed in terms  
11 of what we were supposed to do, what they were supposed to  
12 do.

13 And we just wanted them to be clear that because  
14 that event happened, it triggered other rights or other  
15 actions that could flow out of that. And that's what I was  
16 pointing out to them in that last sentence of the third  
17 paragraph.

18 MR. HINDERAKER: I've been handed a note that  
19 perhaps the jurors monitors are off?

20 Am I wrong? Am I right?

21 THE COURT: Are they on or are they off?

22 THE JURY: Off.

23 THE COURT: It's on on my -- did it come on now?

24 THE JURY: No.

25 THE COURT: All right. Hang on. Now have is as



1 good a time as any to stand up and stretch for a second.

2 (Off the record)

3 THE COURT: I don't know why they went off. It  
4 said that everything was off, but everything wasn't off.  
5 Yours were off.

6 MR. HINDERAKER: Swell.

7 Could I ask or the court may ask? I've been  
8 asking questions about this Exhibit 90 for a while. Has  
9 Exhibit 90 ever been on the screen?

10 THE JURY: No. It's been off since the first  
11 sidebar.

12 THE COURT: Say again?

13 THE JURY: It's been off since the first sidebar.

14 THE COURT: Okay. Well --

15 MR. HINDERAKER: Can I go through some of this  
16 again then?

17 THE COURT: You may.

18 MR. HINDERAKER: Thank you.

19 THE COURT: Let me just test something again. It  
20 shouldn't affect it, but go ahead.

21 BY MR. HINDERAKER:

22 Q. If I might, I don't know that I can ask the same  
23 questions again, and I don't know that you'd want to hear  
24 them again, but I would like to have the opportunity to walk  
25 through the letter so you see what it is. And I'll try to

1 do that appropriately. So let's try it again.

2 This January 27, 2016, letter is, Mr. Carretta,  
3 your letter giving, as you say, notice of breach of Blaze  
4 Advisor software license and maintenance agreement," right?

5 A. That is correct.

6 Q. Okay. And when we look at the third paragraph of the  
7 first page, I had asked you questions about, "I am writing  
8 now to again confirm the agreement may not be transferred or  
9 assigned without FICO's consent."

10 I asked you why did you say "again." And correct  
11 me if I am wrong, but you said again because you understood  
12 that Mr. Sawyer or Mr. Schreiber had made contact with Chubb  
13 about the -- look at the license agreement in light of the  
14 fact of the announced merger.

15 A. That's right.

16 THE COURT: Mr. Hinderaker, if I might make a  
17 brief suggestion.

18 MR. HINDERAKER: Yes.

19 THE COURT: I think that's exactly right. The  
20 more you can lead through what you've already done --

21 MR. HINDERAKER: Thank you.

22 THE COURT: -- the better.

23 MR. HINDERAKER: Thank you.

24 BY MR. HINDERAKER:

25 Q. And then you go on in the rest of that sentence and say,

1 "May not be transferred." "The agreement may not be  
2 transferred or assigned without FICO's consent."

3 And that FICO has not and does not consent to such  
4 transfer or assignment.

5 And in the prior questioning, you said that's a  
6 reference to the first sentence of paragraph 10.8.

7 A. That is correct.

8 Q. "The attempted assignment is void and a breach of the  
9 agreement." The agreement plainly states in Section 10.8  
10 that the agreement may not be assigned without consent.

11 Then I asked you questions about the next  
12 sentence, "A change of control or merger and acquisition of  
13 Chubb was also stated as being a deemed assignment requiring  
14 consent."

15 And I asked you questions about the phrase "was  
16 also." And you said, well, I talked about the first  
17 sentence. Now it was also. I'm talking now about the  
18 second sentence of paragraph 10.8, right?

19 A. Yes.

20 Q. And then you mentioned other sections of the license  
21 agreement, 2.1, 2.2 and 3.1, stating that the license is  
22 non-transferrable, in your letter.

23 A. That is correct.

24 Q. And then when we did not have the monitors up, we went  
25 to Section 2.1 of the license agreement and saw that it had

1 language forbidding -- saying it was non-transferrable. We  
2 went to Section 2.2 saying the same thing. And we went to  
3 Section 3.1 saying essentially the same thing as well,  
4 correct?

5 A. That's right.

6 Q. And then we turned to the second page. And I asked you  
7 about the last sentence on the top paragraph that comes over  
8 from the second or from the first page. And I went, Chubb  
9 Limited is making use after this notice by FICO of the  
10 requirement for consent, "Constitutes Chubb and Chubb  
11 Limited as intentional infringers under applicable copyright  
12 or patent laws in addition to being a breach of the  
13 agreement."

14 And I asked you what you meant by "Chubb," and you  
15 said that's the client Chubb & Son. And I asked you what  
16 you meant by "Chubb Limited," and you said that's the new  
17 larger organization after the acquisition, correct?

18 A. Yes. Yes.

19 Q. And then in the next sentence, the next paragraph, FICO  
20 lacks sufficient information to understand the full impli --  
21 I couldn't say the word then either -- implications of Chubb  
22 Limited's plans and without some shared insight is unable to  
23 accommodate any request now for a consent.

24 A. That is correct.

25 Q. Okay. And you explained that at this point in time FICO

1 at least to your knowledge, FICO simply had not received any  
2 information from Chubb & Son?

3 A. No.

4 Q. Correct?

5 A. That is correct.

6 Q. We are aware, of course, that a much larger entity --  
7 and I asked you that's a reference to Chubb Limited?

8 A. That is correct.

9 Q. "As a result of the merger and how allowing the license  
10 transfer will expose FICO to adverse impacts based upon the  
11 expanded risk of IP indemnity of a larger organization."

12 And at that point you explained to the jury how  
13 software companies typically indemnify their clients against  
14 any IP claims directed against your software.

15 A. That is correct.

16 Q. And so how being in a larger organization created  
17 greater risk to FICO to honor that indemnity.

18 A. That is correct.

19 Q. "Additionally the original enterprise license was based  
20 on Chubb & Son only, not the much larger client  
21 organization."

22 I asked you. That's a reference to the second  
23 sentence of paragraph 10.8?

24 A. Yes.

25 Q. Then we went to the -- then we went to the next

1 paragraph. "While FICO will consider licensing its IP to  
2 Chubb Limited, please understand that it is not acceptable  
3 or agreed that Chubb Limited may make use of FICO's IP."

4 So that's repeating what you've said before about,  
5 after this breach letter, no use.

6 A. That is correct.

7 Q. You retain the right to terminate. Nothing should be  
8 construed as a waiver.

9 And you go on to say, "We understand that this was  
10 a large transaction and this may have been an oversight."

11 And you explain how in large transactions  
12 sometimes things are missed or sometimes you just close over  
13 the problem. You didn't know which.

14 A. That's right. Correct.

15 Q. But if there was an oversight, it didn't change the fact  
16 of your notice of breach letter.

17 A. No. If it was a mistake or active, it doesn't matter.  
18 The event happened, and it therefore is a breach.

19 Q. And then you go on to say, "FICO does not waive its  
20 right to terminate the agreement immediately under  
21 Section 9.2c."

22 A. Correct.

23 Q. So looking at 9.2c -- I got to get to c. If I look at  
24 the first sentence of 9.2c, "Fair Isaac may immediately  
25 terminate this agreement without a requirement for prior

1 notice or a cure period if client violates any terms of the  
2 license granted in this agreement."

3 That's the first sentence.

4 A. That is correct.

5 Q. Is that the sentence that you were -- is that what you  
6 were referencing to in your letter?

7 A. That's right, because my letter was the notice of  
8 breach, and I didn't want it confused that we didn't have  
9 other rights to immediately terminate. It says the word  
10 "may."

11 Q. The other rights being any violation of the license  
12 grant for 9.2c.

13 A. That's correct.

14 Q. And then you go on and conclude, "FICO is mindful of the  
15 long business relationship with Chubb and is willing to  
16 entertain a business resolution for the matter within the  
17 next 30 days.

18 "I'm happy to entertain a discussion and encourage  
19 the authorized business representatives from both parties to  
20 both firms to further discussions."

21 A. That's right.

22 Q. Okay. Whether you wrote the letter, what did you  
23 understand what happened in 30 days?

24 A. If we weren't able to reach a business solution and  
25 continue the relationship, then we would be terminating the

1 license agreement.

2 Q. Then let's turn to Exhibit 91. This is a letter dated  
3 February 17, 2016. It's from, if we go to the last page,  
4 it's from Andrew D. Hopp, Esquire, deputy general counsel of  
5 Chubb. Agreed?

6 A. Yes.

7 Q. And it is to you.

8 A. That is correct.

9 Q. I'd like to -- I'd like to look at the first paragraph,  
10 please.

11 A. Yes.

12 Q. Okay. If we can get to that? We will in a second. The  
13 first paragraph.

14 Mr. Hopp says to you, "Notwithstanding the  
15 acquisition, Chubb & Son, the contracting party to the  
16 agreement, remains a viable legal entity within the Chubb  
17 Group of Insurance Companies corporate structure and the  
18 contracting party to the agreement."

19 Did you agree with Mr. Hopp that Chubb & Son was  
20 the contracting party to the agreement?

21 A. Yes.

22 Q. And did you agree that it remained the contracting party  
23 to the agreement? Let me just read the next sentence.

24 "In short Chubb & Son is still FICO's client and  
25 as such term is defined in the agreement, and it is our



1 position that no transfer or assignment of the agreement has  
2 occurred."

3 Did you have any disagreement with that?

4 A. Yes. That's just wrong.

5 Q. How so?

6 A. Well, the very first part of that sentence he says,  
7 there was an acquisition, which was one of the items listed  
8 in 10.8. It's plain as day. And Chubb & Son is a division  
9 of Federal, which is a corporation owned by Chubb  
10 Corporation; and as a result of the merger, it was now owned  
11 by Chubb Limited.

12 Chubb Corporation disappeared. And so there was a  
13 whole new company in effect in charge, Chubb Limited. And  
14 while it would still say Chubb & Son, the corporate  
15 structure actually changed.

16 That's the whole purpose of Section 10.8. From a  
17 commercial perspective, we want to understand who we are  
18 going to do business with and why and how to price software.  
19 All of these commercial issues are involved.

20 Q. And so in your answer that you just gave me, are you  
21 referencing the second sentence of paragraph 10.8?

22 A. I am. Correct.

23 Q. And in the next, in the next paragraph, "However, we are  
24 in the process of evaluating Chubb & Son's use of Blaze  
25 Advisor software based enterprise license. While we

1 continue to evaluate our use and needs, our initial findings  
2 indicate that the applications that have been utilizing  
3 Blaze Advisor software since 2006 are currently running in  
4 the exact same fashion as prior to the merger transaction."

5 Let me stop there.

6 A. It doesn't change anything.

7 Q. Well, in your mind why doesn't it?

8 A. Because that's not --

9 MS. GODESKY: Objection.

10 THE COURT: Sustained.

11 BY MR. HINDERAKER:

12 Q. If Chubb & Son was using Blaze Advisor after the merger  
13 in the exact same fashion, would that have changed your  
14 notice of breach letter?

15 A. No.

16 MS. GODESKY: Objection.

17 THE COURT: Overruled.

18 BY MR. HINDERAKER:

19 Q. And is that because when you, as you said earlier, the  
20 event that triggered the notice of breach letter was the  
21 acquisition without FICO's prior consent for continued use?

22 A. That is correct.

23 Q. And is it also correct, because of the -- because of  
24 your letter, the period of time in which for FICO and  
25 Chubb & Son to agree and continue relationship or not agree

1 and terminate the license was that 30-day period?

2 A. That is correct.

3 Q. Then Mr. Hopp in the third paragraph mentions that the  
4 FICO and his business people are discussing purchasing new  
5 additional products and professional services. And he  
6 concludes, "I suggest that we allow the business  
7 representatives to continue their commercial discussions  
8 with one another without legal intrusion."

9 Did you have any disagreement with that?

10 A. No, I didn't. In fact I was perfectly aligned with  
11 that.

12 Q. And you had said so in your first letter.

13 A. That is correct.

14 Q. You conclude, "We are very mindful of the long-standing  
15 business relationship between the organizations, and we are  
16 committed to working in the spirit of good partnership with  
17 FICO moving forward."

18 You had no quarrel with that either.

19 A. No, I did not.

20 Q. Let me turn to the next exhibit in your notebook or your  
21 binder, Number 92.

22 And now you are writing back to Mr. Hopp, and your  
23 letter is dated February 22, 2016. Do you have that before  
24 you?

25 A. I do.

1 Q. All right. So in the first paragraph you say, "The  
2 agreement sets out in plain language that either a change of  
3 control or a merger requires FICO's consent prior to any  
4 assignment or transfer and that attempted assignment or  
5 transfer is void."

6 Is that a reference to the second sentence of  
7 paragraph 10.8, as well as the third sentence of  
8 paragraph 10.8?

9 A. Yes.

10 Q. And then in the third paragraph you say, "If Chubb  
11 Corporation through its subsidiary Federal Insurance Company  
12 division, Chubb & Son, was no longer in control or merged  
13 and the event turned on simply Chubb & Son being an existent  
14 division, it defeats the purpose of having Section 10.8  
15 overall."

16 A. That's correct.

17 Q. And you believed that then and you believe it now?

18 A. Absolutely.

19 Q. You go on to say, "The restrictive language and concept  
20 requirement would be superfluous as there would be no point  
21 of having all the language since the occurrence of any one  
22 of the enumerated events could by remaining the client  
23 bypass the restriction on assignment."

24 And that also is a reference to the second  
25 sentence of paragraph 10.8?

1 A. That is correct.

2 Q. Are you telling Mr. Hopp that under his interpretation  
3 the second sentence of 10.8 is meaningless?

4 A. I'm telling him his position is wrong. He's just not  
5 reading it.

6 Q. Let me go to the second page then. The first full  
7 paragraph. And you say, "Chubb & Son is making use after  
8 notice by Fair Isaac of the requirement for a consent.  
9 Breach and demand for a license makes Chubb & Son an  
10 intentional infringer, in addition to having breached of the  
11 agreement."

12 So you are repeating that notice to them again?

13 A. That is correct.

14 Q. Then on the -- it's really the, I guess it's the second  
15 full paragraph. I think sometimes the third paragraph. "In  
16 reviewing this matter, I reviewed Chubb Limited and Chubb  
17 Corporation's public filings." And you go on to say a  
18 number of things about that.

19 Why did you do that?

20 A. Because he was ignoring the fact that the acquisition  
21 happened. He admitted it in his other letter, but he was  
22 ignoring it in all of his arguments or his letters. So I  
23 was pointing out, look, these are public facts. They're  
24 prepared by the Chubb lawyers. They're filed with the  
25 Securities Exchange Commissions. They're representing these

1 as all being true.

2 And if you go through A through E, you see, okay,  
3 Chubb Limited now owns the company, including Federal and  
4 its subsidiary or, excuse me, its division, Chubb & Sons,  
5 that all of the people that were managing Chubb Corporation  
6 are all gone.

7 In fact, John Finnigan was getting paid his change  
8 of control money, which is a pretty good indicator that the  
9 event happened. They changed the headquarters to  
10 Switzerland. That's a big change.

11 And except for the independent directors in  
12 subparagraph e, who are just that, they don't work for  
13 Chubb. They are not Chubb employees. They are just  
14 independent directors like your supposed to have who are a  
15 minority, all the rest are Chubb Limited people.

16 So it was indisputable in my mind that the event  
17 occurred. They said it occurred. Andrew said it occurred  
18 in his letter, and therefore we need to get by that. They  
19 should have asked for consent, and they didn't prior to the  
20 merger closing.

21 Q. And you are detailing for him different indicia of the  
22 change of characteristics of the new Chubb Limited as  
23 compared to what the prior Chubb Corporation had been?

24 A. That's right. They are just two different companies.  
25 They are not the same people.

1 Q. And then attached to your letter and in the exhibit is  
2 the United States Securities and Exchange Commission 8-K  
3 form, correct?

4 A. That is correct.

5 Q. And that's what you were referencing in your letter?

6 A. Right.

7 Q. And then on the last page of your letter of  
8 February 22nd, you say, "As you note the respective business  
9 representatives of FICO and Chubb Limited are in business  
10 discussions to address this issue, as well as possible other  
11 matters. While I also encourage these discussions, please  
12 understand that it is not acceptable or agreed that any  
13 entity or division within Chubb Limited make use of the  
14 software."

15 So on the one hand, you are encouraging business  
16 negotiations, and on the other hand, you are clear about  
17 stating FICO's rights.

18 A. That is correct.

19 Q. Well, then let's move to Exhibit 93. This is Andrew  
20 Hopp to you a few days later, February 25, 2016.

21 A. That's correct.

22 Q. Agreed?

23 A. Yes, I agree.

24 Q. And he says to you, "Mr. Carretta we continue to  
25 disagree. In an effort to preserve a working relationship

1 between our companies, our IT software compliance team is  
2 forwarding a commercial proposal to your sales  
3 representatives for consideration."

4 A. That's correct.

5 Q. Agree?

6 A. I agree.

7 Q. I presume you passed that information on to the sales  
8 representatives.

9 A. I passed that a proposal was forthcoming. I didn't  
10 actually receive the proposal.

11 Q. Understood. So there was other, other witnesses I am  
12 sure will testify to the commercial proposal, but that went  
13 to the business folks, not to you.

14 A. That is correct.

15 Q. And then if we go to the next Exhibit 95. And it is the  
16 next day you say to Mr. Hopp, "Thank you for the email. The  
17 proposal was not acceptable from our business and compliance  
18 teams, and I confirm it is rejected."

19 That's what you told him on that day.

20 A. That's what I told Andrew Hopp, correct.

21 Q. "However, I respect the effort and encourage continued  
22 aggressive business dealings. Thank you for facilitating  
23 the business discussions."

24 So that's your communication to him on the 26th of  
25 February.



1 A. I actually used the word "business dialogue" but --

2 Q. I misread it. Okay.

3 And then I think it's the same date. Let's go to  
4 Exhibit 96. February 26, 2016.

5 A. Yes.

6 Q. And Mr. Hopp says to you, "Thank you for your response,  
7 and I agree with the approach."

8 A. That's correct.

9 Q. Sort of ends the communications that I'll be chatting  
10 with you about until we get to Exhibit 103.

11 A. Okay.

12 Q. And if you would turn to that, please. This is dated  
13 March 30, 2016?

14 A. That's correct.

15 Q. And in the first paragraph you reference Chubb Limited,  
16 you reference your letter of January 27th. You reference  
17 the merger of Chubb Corporation and ACE Limited, resulting  
18 in the Chubb Limited, which in this letter you call new  
19 Chubb.

20 And you reference breach of Section 10.8 of the  
21 license agreement, correct?

22 A. That is correct.

23 Q. And in the next paragraph, you say, "I notified you by  
24 email on March 11th that FICO had become aware of a further  
25 material breach due to the use of the software outside of

1 the United States and two applications utilized in the  
2 United Kingdom. Moreover, during the period of time in  
3 which FICO and new Chubb attempted resolve the breach of  
4 Section 10.8, we became aware of the further application in  
5 Canada." I'll stop there.

6 What was the source of your information to make  
7 that statement?

8 A. I can't recall it specifically, but I thought it was me  
9 that asked the maintenance and support organization to look  
10 at the maintenance logs.

11 Q. Okay.

12 A. So this is a process where they, a client is given a  
13 key. If they have bugs to report or need information, they  
14 just log something into the system, and then it gets  
15 captured.

16 Q. That would be the same thing as a help desk log?

17 A. The same thing.

18 Q. So the information that you were stating in this letter  
19 came to you from help desk log information?

20 A. That's correct.

21 Q. Then you go on to say, "And the disclosure of  
22 confidential information to an unauthorized third-party  
23 consultant."

24 And what was the source of your information to say  
25 that in the letter?

1 A. The same, same source.

2 Q. Okay. Thank you. Then you finish, "This information  
3 was conveyed to the new Chubb business counter part Tamra  
4 Pawloski, VP of software compliance and optimization."

5 Now, when you say that disclosure of confidential  
6 information to an unauthorized third party is a breach, is  
7 that a reference to paragraph 3.1 of the license agreement?

8 A. One moment. Yes.

9 Q. And when you said that Blaze Advisor software outside of  
10 the United States and the United Kingdom and in Canada, what  
11 was the basis of -- what in the license agreement led you to  
12 believe that that was a breach?

13 A. The reference to territory in paragraph 1 of the license  
14 agreement.

15 Q. Saying?

16 A. That the software is to be installed and physically  
17 located in the United States.

18 Q. And then you conclude your letter, "Attempts to amicably  
19 resolve the dispute have been unsuccessful. This letter  
20 serves as notice that the agreement is terminated effective  
21 March 31st. Please take further notice of the provisions of  
22 Section 9.3 of the agreement.

23 "As noted in my January 27, 2016, letter, FICO  
24 considers new Chubb's current use and any future use of the  
25 software as a breach of the agreement and willful

1 infringement of all applicable intellectual property rights,  
2 including but not limited FICO's underlying copyrights and  
3 patents."

4 I'd like to then, I'd like to turn then, if we  
5 could, to paragraph 9.3 of the license agreement J1, J001.

6 A. Okay.

7 Q. Let me get there myself. And paragraph 9.3 is entitled  
8 Effect of Termination. Agreed?

9 A. Yes. That is correct.

10 Q. And it says, "Upon expiration or termination of this  
11 agreement for any reason, all licenses granted hereunder  
12 shall terminate immediately. All support and maintenance  
13 obligations shall cease. Client shall immediately cease  
14 using all Fair Isaac products and related documentation  
15 (including all intellectual property arising from or related  
16 to the foregoing), shall remove all copies of the Fair Isaac  
17 products and related documentation from client's computer  
18 systems," and so on.

19 And that is the provision that you were  
20 specifically referencing regarding the effect of termination  
21 in your notice of breach letter?

22 A. That is correct.

23 Q. And shortly after that, this lawsuit was commenced.

24 Have you had any -- did you have any involvement,  
25 other than being a witness, did you have any involvement in

1 the management or handling of this lawsuit?

2 A. No.

3 Q. Your participation or your role in this whole matter is,  
4 is that of a witness?

5 A. That is correct.

6 MR. HINDERAKER: No further questions, Your Honor.

7 THE COURT: Ms. Godesky.

8 MS. GODESKY: Your Honor, may I approach?

9 THE COURT: You may.

10 (Sidebar discussion)

11 MS. GODESKY: So given Mr. Carretta's reference  
12 just now in this last line of questions to his view that the  
13 license agreement has a territorial restriction, I would  
14 like to either be able to ask Mr. Carretta, as you suggested  
15 during the pretrial conference, whether he's aware that the  
16 court has held that the license agreement unambiguously does  
17 not include a territory restriction or that Your Honor  
18 instruct the jury to that fact.

19 MR. HINDERAKER: And I disagree for all the  
20 reasons that we've argued before and all the reasons that  
21 the court should not interfere with this issue of whether  
22 FICO acted in good faith or not.

23 THE COURT: I understand the question to  
24 Mr. Carretta. It's an appropriate question. It asks him  
25 for why he said it, what's your good faith basis.

1 MR. HINDERAKER: And I did not pursue it any  
2 farther.

3 THE COURT: You didn't. I do think -- I will  
4 instruct the jury that the court has determined that there's  
5 no territorial restriction in the license and leave it at  
6 that.

7 And so I'm not going to allow the "where"  
8 question. Okay?

9 MS. GODESKY: Okay. Yes.

10 THE COURT: But I will give that instruction  
11 later, not right now.

12 MR. HINDERAKER: And I hope that you would even do  
13 it in final instructions to say that the geographic  
14 restriction is not an issue in the case, and it's limited to  
15 the good faith claim, but that's a decision for another day.

16 THE COURT: We'll work on that, but I will  
17 certainly instruct that there's not a territorial  
18 restriction in the license.

19 MR. HINDERAKER: But not today. Let's not get the  
20 court involved today.

21 THE COURT: Okay? How long do you suspect your  
22 cross will take?

23 MS. GODESKY: 45 to an hour.

24 THE COURT: I'd like to start and then take our  
25 break. Okay.

1 MS. GODESKY: Sure.

2 THE COURT: And I'll try not to turn off the  
3 monitors.

4 (In open court)

5 MS. GODESKY: Another binder.

6 THE WITNESS: Thank you.

7 CROSS-EXAMINATION

8 BY MS. GODESKY:

9 Q. Good afternoon, Mr. Carretta.

10 A. Good afternoon.

11 Q. My name is Leah Godesky, and I represent the defendants  
12 in this case.

13 So you testified on direct examination that when  
14 you were at FICO you were the vice president of legal and a  
15 deputy general counsel; is that right?

16 A. That is correct.

17 Q. And just so everyone understands, the general counsel at  
18 a company is the lead lawyer in an organization, correct?

19 A. That's right.

20 Q. Okay. And a deputy general counsel is sort of that lead  
21 lawyer's direct report, as a second in command, kind of  
22 position, right?

23 A. Right.

24 Q. And you were one of two deputy general counsels at FICO.

25 A. Yes.

1 Q. And so you were one of the most senior lawyers at the  
2 company.

3 A. That's a fair statement.

4 Q. And you primarily supervised a group of lawyers who  
5 worked on FICO's contracts.

6 A. Right.

7 Q. Including things like license agreements for Blaze  
8 Advisor.

9 A. Yes.

10 Q. And you had the same job at FICO up until your  
11 retirement beginning in June of 2005. Do I have that right?

12 A. No. I started in June 2005 at Fair Isaac.

13 Q. Okay. And then --

14 A. And I held it until I retired.

15 Q. Okay. And as you said during direct examination, 2015,  
16 the year that the ACE/Chubb acquisition was announced was  
17 the first time you became involved in FICO's relationship  
18 with Chubb, correct?

19 A. Yes.

20 Q. You were not involved in negotiating the license  
21 agreement?

22 A. No, I was not.

23 Q. You were not involved in drafting the license agreement?

24 A. No, I was not.

25 Q. And that means you cannot speak to any communications



1 between Chubb and FICO in the 2006 time period as to what  
2 particular provisions meant.

3 A. I was not a party to that discussion in 2006. That's  
4 correct.

5 Q. And you became involved in FICO's relationship with  
6 Chubb in 2015 because Mike Sawyer and Russ Schreiber, two  
7 sales folks at FICO, had heard about the ACE acquisition,  
8 right?

9 A. Yes.

10 Q. And the first time that you sat down and you read the  
11 Blaze Advisor contract that Chubb signed was 2015 after they  
12 came to you, correct?

13 A. Yes.

14 Q. Now, you made a point of emphasizing during your direct  
15 examination that the client in the Blaze Advisor license  
16 agreement is the Chubb & Son division of Federal, right?

17 A. That's correct.

18 Q. And you understand that one of the reasons we're all  
19 here is that FICO is taking the position that FICO only  
20 licensed Blaze to the Chubb & Son division within Federal,  
21 right?

22 A. That's right.

23 Q. Now, the Chubb & Son division within Federal is not a  
24 legal entity. We all agree on that, right?

25 A. Yes.

1 Q. And I want to take a look at that letter you sent in  
2 January 2016 where you claimed for the first time that the  
3 Chubb entity was in breach. And that is now in evidence as  
4 P90.

5 A. It's not on my screen.

6 Q. Mine either. I think we are working on it.

7 Are we hooked up?

8 THE COURT: We are all hooked up.

9 MS. GODESKY: Just one moment.

10 THE WITNESS: Sure.

11 MS. GODESKY: There it is. Thank you, Vanessa.

12 BY MS. GODESKY:

13 Q. Okay. So you talked about this letter with  
14 Mr. Hinderaker, right?

15 A. That's correct.

16 Q. And you said you wrote this letter to Mr. Joseph F.  
17 Wayland in the legal department at Chubb Group and at Chubb  
18 Limited, right?

19 A. That's correct.

20 Q. And the subject line of your letter was, "Notice of  
21 Breach of Blaze Advisor Software License and Maintenance  
22 Agreement Dated June 30th, 2006, As Amended," correct?

23 A. That's correct.

24 Q. And this, of course, this is a letter you sent, just so  
25 everyone is clear on the timeline, before the litigation,

1 right?

2 A. That is correct.

3 Q. And in the first sentence of your letter you wrote,  
4 "FICO and the Chubb Corporation, through its Chubb & Son  
5 division, are parties to the above-referenced agreement."  
6 Correct?

7 A. Yeah. It was shorthand because Federal was a subsidiary  
8 of Chubb.

9 Q. But you used that phrase "the Chubb Corporation" and  
10 FICO were parties to the agreement, and the Chubb  
11 Corporation had entered the agreement through its Chubb &  
12 Son division.

13 That was the phrase you used, correct?

14 A. Yeah. It's using shorthand there. That's right.

15 Q. You don't work on pricing of Blaze license agreements,  
16 but you have a general understanding based on all of your  
17 years at the company that FICO prices enterprise Blaze  
18 licenses generally based on the revenue of the company  
19 that's purchasing the license, right?

20 A. I wouldn't phrase it that way. We use value pricing,  
21 meaning what does the client expect, what problem are they  
22 trying to solve for what size of an organization, and then  
23 the business people come up with the pricing. So it's not  
24 one single methodology, but that -- it is value priced, is  
25 the way I would phrase it.

1 Q. Do you have an understanding, Mr. Carretta, that when  
2 the business people set enterprise license prices at FICO  
3 they look at the revenue of the organization that wants to  
4 use Blaze?

5 A. It depends on how you define "enterprise." So  
6 "enterprise" is a very misused word in the industry, because  
7 there might be the enterprise of a subsidiary, the  
8 enterprise of a global entity or some segment. And  
9 "enterprise" can also mean how open it is, how many people  
10 can use the software.

11 It might become unlimited. Where it could be  
12 located might become unlimited. There's a lot of variables,  
13 and that's why the agreement defined what "enterprise"  
14 meant.

15 Q. Do you know what Chubb entity the FICO business team  
16 that priced Chubb's license was looking at when they set  
17 that \$1.3 million license fee for Chubb? Do you know?

18 A. No.

19 Q. Do you know whether the Chubb & Son division of Federal,  
20 that nonlegal entity, even reports its own separate revenue?

21 A. No.

22 Q. Now, we can all agree and you have a general familiarity  
23 with the succession of Blaze license agreements that Chubb  
24 entered, right?

25 A. Chubb & Son.

1 Q. Okay. Chubb & Son.

2 We can all agree that the December 2006 amendment,  
3 as amended in December 2006, the license cost more money  
4 than it did in June, right?

5 A. That's correct.

6 Q. Okay. I want to put up Defendants' Demonstrative 22,  
7 just to help us walk through this.

8 So, Mr. Carretta, is it true that the first  
9 license that Chubb purchased from FICO only allowed Chubb to  
10 use Blaze in a single application and cost about \$173,000?  
11 Does that sound right?

12 A. I mean, I need to look at the agreement to see exactly  
13 what they bought, but they bought a limited license at  
14 first. That's correct.

15 Q. Okay. And if you'd look in the binder I just handed  
16 you, there's a copy of the license agreement behind J1.

17 A. Okay.

18 Q. And you can look at page 11, if you go by the little  
19 bottom numbers on that document.

20 A. Okay. I'm on that page.

21 Q. Okay. So looking at that, is it accurate that the first  
22 license allowed Chubb to use Blaze in a single application,  
23 and the cost was about \$173,000?

24 A. For five seats. That's right.

25 Q. Okay. And then the second division-wide license, does

1 it sound right that it was \$350,000?

2 A. I think it was a little more than that, 355, something  
3 like that. I see it is 350 plus maintenance.

4 Q. Okay. And then the enterprise-wide amendment in  
5 December 2006 increased the price to 1.3 million, correct?

6 A. Right, with credit for the fees they had already paid.

7 Q. Okay. Now, I want to take a look at that December 2006  
8 amendment that came with that price tag increase up to  
9 \$1.3 million.

10 So, Vanessa, if we could pull up J1. It's already  
11 in evidence. And I want to look, if we could, at page 20.

12 And so, Mr. Carretta, just so you have your  
13 bearings, and you can look at the hard copy, we're now in  
14 the December 2006 amendment. Okay?

15 A. Correct.

16 Q. And the top of the second page says, "For purposes of  
17 this Amendment Two, the enterprise-wide license shall mean  
18 that client and its affiliates may use the Fair Isaac  
19 product." Right?

20 And then it goes on to talk about internal  
21 business purposes and no limitation on the number of seats  
22 or CPUs, correct?

23 A. Yes, it says what it -- I mean, what you have on your  
24 screen.

25 Q. Okay. And that language was not in the two prior Blaze

1 license agreements, the ones from earlier in 2006, right?

2 This was new language.

3 A. Right. That's new language.

4 Q. And you understand now that Federal Insurance Company  
5 has global affiliates in Chubb Australia, Chubb Europe, and  
6 Chubb Canada. You've come to have that understanding,  
7 right?

8 A. Could you repeat that?

9 Q. You've come to understand, Mr. Carretta, that Federal  
10 Insurance Company has affiliates like Chubb Canada, Chubb  
11 Australia, and Chubb Europe, correct?

12 A. Federal does. That's correct.

13 Q. Okay. And you anticipated my next question, because the  
14 Chubb & Son division of Federal, the only entity that FICO  
15 now says could use the Blaze program, they didn't have any  
16 affiliates as of December 2006, correct?

17 A. Chubb & Sons is not an affiliate.

18 Q. Chubb & Son doesn't have affiliates because it's not a  
19 legal entity, right?

20 A. That is correct.

21 Q. So in your view, since Chubb & Son is the only client,  
22 the addition of all this language about how now client and  
23 its affiliates can use Blaze did not actually expand Chubb's  
24 ability to use Blaze at all, right?

25 A. It was still captured within Chubb & Sons. That's

1 right.

2 Q. So there was no expansion with this new language and the  
3 \$1.3 million price tag.

4 A. No. That's what they apparently negotiated. That's  
5 right.

6 Q. And your view is that Chubb paid all this extra money  
7 for this new reference to affiliates because one day down  
8 the road the Chubb & Son division of Federal might, one,  
9 turn itself into a legal entity; and, two, acquire  
10 affiliates that might need to use Blaze.

11 A. I don't agree with that. I don't know why Chubb would  
12 want that language.

13 Q. Okay. Mr. Carretta, we have a binder in front of you  
14 that has a copy of your October 9th, 2018, deposition. Can  
15 you find that tab, please.

16 A. You said in October?

17 Q. October 9th, yes.

18 A. I have it.

19 Q. And if I could direct your attention to page 122,  
20 line 14.

21 A. Okay. Page 122.

22 Q. Line 14. Question, "You testified that Chubb & Son  
23 could not have any affiliates, as far as you understand it?

24 "Answer: At the point of time that this contract  
25 was entered, Chubb & Son was not a legal entity in and of



1       itself. Therefore, it could not have had affiliates within  
2       the meaning of the definition, but things could change in  
3       the future. They could incorporate as a separate business,  
4       in which case as an entity they could then have the  
5       potential to have an affiliate, but at the time they did not  
6       have that possibility.

7                "And I don't believe they've ever incorporated.  
8       And if they incorporated, it would have implicated the  
9       balance of the agreement as well so you would have to look  
10      at it. So it wasn't meaningless language, and it was  
11      important to Chubb, I believe, to preserve their future."

12               Was that your testimony at your deposition?

13      A. That is correct.

14      Q. Okay. And, of course, whether Chubb had any concerns  
15      back in 2006 about preserving its future, you wouldn't be  
16      able to speak to that because you were not involved in the  
17      negotiations at the time, correct?

18      A. That's correct.

19      Q. This is just an explanation that you've come up with  
20      after reviewing the contract for the first time in 2015,  
21      correct?

22      A. Yes.

23               THE COURT: Ms. Godesky, are you at a convenient  
24      breaking point?

25               MS. GODESKY: I am. Thank you.

1 THE COURT: Okay. Members of the jury, we'll take  
2 our afternoon break. Be back in the courtroom at 25 minutes  
3 to 4:00 on that clock.

4 (Recess taken at 3:17 p.m.)

5 3:36 p.m.

6 **IN OPEN COURT**

7 **(JURY PRESENT)**

8 THE COURT: Be seated.

9 Go ahead.

10 MS. GODESKY: Thank you.

11 BY MS. GODESKY:

12 Q. Mr. Carretta, I want to take a look at the letter you  
13 sent Chubb purporting to terminate the Blaze license  
14 agreement on March 30th, 2016. It's in evidence as P103.  
15 It's in your binder, and it's up on the screen too.

16 A. Okay.

17 Q. Now this is a letter from you to a Mr. Andrew Hopp, a  
18 lawyer at Chubb, right?

19 A. That's right.

20 Q. And you're terminating the license agreement and giving  
21 your reasons for doing so, correct?

22 A. That's right.

23 Q. Okay. I want to look at the second paragraph on this  
24 page where you wrote, "FICO had become aware of a further  
25 material breach due to the use of the software outside the

1 United States and in two applications utilized in the United  
2 Kingdom."

3 Do you see that?

4 A. I do see that first sentence, yes.

5 Q. Now, again, you don't know whether the use of Blaze by  
6 Chubb Europe is something that was discussed back in  
7 December 2006 when the agreement was executed because you  
8 were not involved in those communications, correct?

9 A. I was not involved in those communications or  
10 negotiations, no.

11 Q. And before sending this letter asserting that FICO had  
12 become aware of this improper use, you didn't do anything to  
13 research what representations FICO made to Chubb during the  
14 course of their business relationship about whether Blaze  
15 could be used in Europe, correct?

16 A. No, I don't understand what you mean by your premise  
17 that FICO made representations or such.

18 Q. Well let me ask it a different way. Before sending this  
19 letter, you didn't do anything to research the  
20 representations that FICO employees had made to Chubb during  
21 the course of their business relationship about whether  
22 Blaze could be used at Chubb Europe, correct?

23 MR. HINDERAKER: I'm sorry. Objection. Lack of  
24 foundation.

25 THE COURT: Overruled.

1 THE WITNESS: Again, you're talking about  
2 representations. I'm a lawyer. That has a different  
3 meaning than perhaps for other people.

4 BY MS. GODESKY:

5 Q. Mr. Carretta, before sending this letter, you didn't do  
6 anything to investigate the statements that FICO employees  
7 made to Chubb about whether Blaze could be used by Chubb  
8 Europe, correct?

9 A. I did not. That is correct.

10 Q. And as we heard during your direct examination, when you  
11 made this reference to a material breach that you had just  
12 learned about, you were going off of entries in a  
13 maintenance log, right?

14 A. I was informed by the maintenance organization. I  
15 didn't actually read the logs.

16 Q. But you had asked them to go through the logs, right?

17 A. I did.

18 Q. Okay. Now, you testified earlier that Mike Sawyer was  
19 one of the business people at FICO who came to you after he  
20 saw the announcement of the big ACE acquisition with  
21 questions about the license agreement, right?

22 A. Yes.

23 Q. Before you sent this letter purporting to terminate the  
24 license agreement based on alleged improper use in Europe,  
25 you didn't check to see if Mr. Mike Sawyer himself had ever

1 confirmed that Chubb in fact could use Blaze in Europe, did  
2 you?

3 A. I don't recall that, no.

4 Q. I want to show you a document that's in evidence. It's  
5 P47.

6 And, Mr. Carretta, there's a Bates stamp at the  
7 bottom which says FICO, which means it was produced from  
8 FICO's files, right?

9 A. I see the FICO Bates stamp, yes. So I assume that FICO  
10 produced it, yes.

11 Q. And I want to look at the email at the bottom of this  
12 first page. This is an email from Mr. Mike Sawyer to  
13 Richard Hill and Russ Schreiber. Do you see that?

14 A. I do.

15 Q. These are all FICO employees, correct?

16 A. Yes.

17 Q. And this email was sent on August 14th, 2012, a couple  
18 years before the ACE acquisition was announced, right?

19 A. Yes, three years before approximately.

20 Q. And Mike Sawyer writes, "I am the CP for Chubb." Do you  
21 see that?

22 A. Yes.

23 Q. That means client partner, right, the person who is  
24 going to interface with Chubb.

25 A. That's right. He's the sale person. We call them

1 client partners.

2 Q. And Mr. Sawyer writes in the next sentence, "They,"  
3 meaning Chubb, "do have a global ELA for Blaze and have an  
4 automated UW," meaning underwriting, "application running in  
5 the UK already."

6 Do you see that?

7 A. I see that line, yes.

8 Q. So this email shows that FICO through its Chubb client  
9 partner, Mr. Mike Sawyer, was aware as of 2012 that Blaze  
10 was up and running in Chubb Europe, correct?

11 A. I don't, I don't know if I would agree with that.

12 Q. But that's what it suggests, right, Mr. Carretta?

13 A. Well, it says what it says.

14 Q. And you're not aware of anyone at FICO ever suggesting  
15 to Chubb or even suggesting internally that use of Blaze in  
16 Chubb Europe was a material breach of the contract at any  
17 time before 2016 when you sent this letter, correct?

18 A. I believe that's correct.

19 Q. I want to look at one more document that's also already  
20 in evidence. P60. This is an April 1st, 2015, email from  
21 Oliver Clark at FICO to Richard Lagerweij at FICO titled  
22 "Decision Simulator Proposal."

23 Do you see that?

24 A. I do.

25 Q. And this is forwarding a message that a Mr. Moffat at

1 FICO had sent to Hamish Tonkin at Chubb earlier that day,  
2 correct?

3 A. I think I'd have to do the timing math because I think  
4 Andrew was -- yeah, he is a London guy. So I don't know if  
5 that's correct or not. You just have to sort out the  
6 timing. It looks like it.

7 Q. Well, the email from Mr. Moffat is at the bottom of the  
8 chain and then it gets forwarded, right, later in the day?

9 A. That's what it looks like, yeah.

10 Q. And Mr. Moffat, according to this document, is a senior  
11 account executive at FICO, right?

12 A. That's right.

13 Q. And his address is listed as London.

14 A. That's right.

15 Q. And if you look at the email about towards the bottom of  
16 the page, he says, "Hi, Hamish."

17 Do you see that?

18 A. I do.

19 Q. And he says, "Please see the attached proposal for the  
20 licensing costs and associated training for decision  
21 simulator. The prices are heavily discounted in line with  
22 the existing Blaze contract. No additional Blaze licenses  
23 are needed as it is covered within the overall global Blaze  
24 ELA."

25 Do you see that?

1 A. Yeah, what's that it says.

2 Q. And that's a statement, just so everyone is clear, from  
3 FICO, not Chubb, right?

4 A. That is from Andy Moffat, who is a senior account  
5 executive. That's right.

6 Q. At FICO?

7 A. At FICO.

8 Q. And that was made in April 2015 about a year before you  
9 wrote that letter saying that there had been a material  
10 breach you just learned about because there was improper use  
11 of Blaze in Europe, correct?

12 A. That's what they're referring to, yes.

13 Q. And you didn't speak to Mr. Moffat or review any of his  
14 communications with Chubb before you sent that letter,  
15 right?

16 A. No, I did not.

17 Q. And in fact the first time you saw this communication,  
18 blessing the use of Blaze in Europe, was at your deposition  
19 in this case when you were showed it by one of the Chubb  
20 lawyers, correct?

21 A. The outside lawyers, yes. That's correct.

22 Q. Okay. Thank you, Vanessa. We can take that down.

23 You also spoke on direct examination about how  
24 your termination letter refers to allegedly unauthorized use  
25 of Blaze by outside consultants, correct?



1 A. That's correct.

2 Q. And was that a reference to these companies DWS and  
3 AppCentrica?

4 A. Yes.

5 Q. Now as a general matter, Mr. Carretta, FICO does agree  
6 in certain circumstances to let its customers share Blaze  
7 with consultants, correct?

8 A. Every deal is different, so it sort of depends.

9 Q. But in your decade plus at the company, you have seen  
10 circumstances where they agree to that, correct?

11 A. Yes.

12 Q. And there's no categorical rule at FICO, we never let  
13 our customers share Blaze with their consultants?

14 A. Like I said, every deal is negotiated.

15 Q. But there's no categorical rule, correct?

16 A. I wouldn't phrase it that way. It's dependent on the  
17 whole deal, and therefore it may or may not be.

18 Q. Okay. Now, again, you became aware of these issues  
19 involving DWS and AppCentrica because after you heard about  
20 the ACE acquisition, you asked folks to start reviewing  
21 FICO's maintenance logs to see if they could see any  
22 problems related to Chubb, right?

23 A. Yes.

24 Q. And you were doing this because you wanted to find a  
25 problem, right?

1 A. We began to become curious about who was using the  
2 software.

3 Q. And in the regular course of business, Mr. Carretta, you  
4 don't usually scan maintenance logs for potential problems  
5 with your customers, right?

6 A. I don't.

7 Q. And you don't direct people to do that either, right?

8 A. I don't direct people to do that.

9 Q. And it would have been helpful for you in this time  
10 period, after the ACE acquisition was announced, if you  
11 could find more potential problems with Chubb's use of  
12 Blaze, correct?

13 A. Not necessarily, no.

14 Q. But it might give you more potential leverage in any  
15 breach letters that you might want to send or conversations  
16 that you want to have with Chubb, correct?

17 A. Not necessarily.

18 Q. But you did end up citing the use of Blaze by these  
19 consultants, just like you cited use of Blaze in Europe, in  
20 your termination letter, correct?

21 A. I reference it in my termination letter. That's  
22 correct.

23 Q. You referred to them as material breaches.

24 A. Yes.

25 Q. And based on those material breaches, you said that the

1 next day the contract was over and Chubb couldn't use Blaze  
2 anymore.

3 A. Among the other breach, the obvious one we spent all day  
4 talking about.

5 Q. Did you do anything to investigate the full extent of  
6 the use, like how many people at AppCentrica or DWS had laid  
7 eyes on the Blaze software?

8 A. I did not personally, no.

9 Q. Any use of Blaze in connection with this potential  
10 project in Australia would have been quite small in the  
11 context of an enterprise-wide license like Chubb had,  
12 correct?

13 A. I don't know that.

14 Q. Well, an enterprise-wide license means that you can use  
15 the software in an unlimited number of applications, right?

16 A. I thought it was limited to the number of applications.  
17 I'd have to look at the agreement to see how they defined it  
18 again.

19 Q. So you can't -- you can't speak at all to the relative  
20 impact of this issue with DWS and AppCentrica relative to  
21 the size of Chubb's use of Blaze and the scope of its  
22 license?

23 A. Well, it's more of an absolute. We don't guess that,  
24 oh, this one is important. It was just two guys that looked  
25 at it, versus Accenture.

1 Q. But my question is whether you did anything to  
2 investigate the magnitude of this issue.

3 A. No, because of what I just said. It's an absolute, you  
4 are not allowed to do this.

5 Q. And did you ever identify any evidence that AppCentrica  
6 or DWS accessed Blaze for any purpose other than assisting  
7 Chubb in its work on one of its internal computer  
8 applications?

9 A. I don't know what they did. I don't remember.

10 Q. So you have not identified any evidence that AppCentrica  
11 or DWS accessed Blaze for any purpose other than assisting  
12 Chubb, correct?

13 A. The only thing I know is that they showed up in the  
14 maintenance logs. I was told that. But I don't remember  
15 any of the details that you are asking about.

16 Q. Okay. So I'm going to ask my question one more time.  
17 You have no evidence that AppCentrica or DWS accessed Blaze  
18 for any purpose other than to assist Chubb in it's computer  
19 application work, correct?

20 A. I just told you I don't remember. I don't believe I was  
21 told that.

22 Q. So that's a no. You don't have any evidence?

23 A. I don't personally have any evidence, no.

24 Q. And are you aware of any evidence that anyone at  
25 AppCentrica or DWS shared Blaze with any third party outside

1 Chubb?

2 A. I don't know. I just know that third parties accessed  
3 the software.

4 Q. So that's a no.

5 A. They are there in the log.

6 Q. So that's a no.

7 A. No. That's just what I said.

8 Q. Mr. Carretta, I'm entitled to an answer to the question  
9 I'm asking. Are you aware of any evidence that anyone at  
10 AppCentrica or DWS shared Blaze with any third party outside  
11 Chubb?

12 A. Not that I'm aware of, other than that they appear in  
13 the logs.

14 Q. Okay. Let's talk about Section 10.8 and this whole  
15 concept of assignment.

16 A. Okay.

17 Q. During your direct examination, when you were talking  
18 about that letter you sent to Chubb on January 27th, 2016,  
19 you made a point of saying in your questioning with  
20 Mr. Hinderaker that Chubb had not responded to Sawyer and  
21 Schreiber at that point in time.

22 Do you remember that?

23 A. Yes.

24 Q. I want to take a look at P131, which is already in  
25 evidence. And I want to go to page 3 of the PDF.

1 A. I'm looking at the screen now, yes.

2 Q. Okay. Perfect. So this starts with an email from Mike  
3 Sawyer to someone at Chubb on January 8th, 2016. Do you see  
4 that?

5 A. Yes.

6 Q. And he says, "Hi, Elie. Happy new year! I am following  
7 up on the voicemail I left you before the holiday."

8 Do you see that?

9 A. I do.

10 Q. And then he says, "Can you get back to me about the ACE  
11 acquisition?"

12 A. Yes.

13 Q. And then if you go to the second page of the PDF,  
14 there's another email from Mr. Sawyer to Mr. Merheb at Chubb  
15 the same day, about three hours later. Do you see that?

16 A. Where in this cycle of all these emails are you?

17 Q. Sure. I'm on the email from Mike Sawyer --

18 A. Yes.

19 Q. -- to Chubb at January 8th at 3:25 p.m.

20 A. I see that.

21 Q. And Mr. Sawyer says, "Elie. Thanks for the call this  
22 afternoon. As discussed attached are Chubb's Blaze Advisor  
23 license agreements for your review." Do you see that?

24 A. I do.

25 Q. So this looks like Mr. Merheb at Chubb called Mr. Sawyer

1 at FICO the afternoon that Mr. Sawyer emailed him, correct?

2 A. Yes.

3 Q. And this was January 8th, 2016, a couple weeks before  
4 you sent that letter alleging breach, correct?

5 A. That is correct.

6 Q. Now if we could go to Joint Exhibit 1, which is the  
7 license agreement, I'd like to take a look at the text of  
8 Section 10.8, which is on page 8.

9 So, Mr. Carretta, there's a few sentences in  
10 Section 10.8, correct?

11 A. Yes.

12 Q. And during your direct examination with Mr. Hinderaker,  
13 you distinguished between the first and the second sentence  
14 of Section 10.8 several times, correct?

15 A. They're independent, yes. That's correct.

16 Q. And you walked us through how certain things in your  
17 breach letter related to the first sentence and how certain  
18 things in your breach letter related to the second sentence.  
19 Do you remember that?

20 A. Yes.

21 Q. Now it's true that FICO will sometimes enter license  
22 agreements that don't have the second sentence that we see  
23 in the Chubb agreement, right? Sometimes FICO enters  
24 license agreements that have assignment clauses without  
25 specific references to mergers and acquisitions, correct?

1 A. Like I said, they're all negotiated, so I'm sure there  
2 are some that don't have that, but I am sure there are some  
3 that do.

4 Q. So you are sure that there are some that do not have  
5 this second sentence that specifically references mergers  
6 and acquisitions?

7 A. Well, this particular sentence has a, an edit added on  
8 to the end that was unique to Chubb. The other, the rest of  
9 the sentence starting with "in the event" and ending with  
10 "provide such consent" is standard template language.

11 Q. Okay. I want to, if we could show Mr. Carretta, and not  
12 yet publish to the jury, Exhibit D304.

13 This is in your binder, but we will put it on the  
14 screen too, Vanessa. I think the judge has turned it off  
15 for the jury.

16 A. Okay.

17 Q. This is a software license agreement between FICO and  
18 [REDACTED], correct?

19 A. That's what's in the header, yes. That is correct.

20 Q. And if you turn to page 15 you can see signatures from  
21 FICO and [REDACTED] going off those --

22 THE JURY: Your Honor, we don't have the --

23 THE COURT: Did you just say that your monitors  
24 are off?

25 THE JURY: Yes.



1 THE COURT: That's actually on purpose at this  
2 time because the exhibit is not yet into evidence.

3 THE JURY: Oh, I'm sorry.

4 THE COURT: Quite all right. I'm glad you asked.

5 THE WITNESS: It's back on my screen.

6 BY MS. GODESKY:

7 Q. Okay. Terrific. So on page 15 you can see that this  
8 was signed by FICO and [REDACTED], correct?

9 A. That is correct.

10 MS. GODESKY: Okay. Defendants offer Exhibit 304  
11 into evidence D304.

12 MR. HINDERAKER: We just maintain our earlier  
13 position, Your Honor.

14 THE COURT: Overruled. The exhibit is admitted.

15 BY MS. GODESKY:

16 Q. And so then if we could publish the document to the jury  
17 and go to page 13, there's an assignment clause.

18 If you could make that bigger Vanessa. Thank you.

19 So, Mr. Carretta, this section reads, [REDACTED]

20 [REDACTED]  
21 [REDACTED]  
22 Your Honor, I think there's a --

23 THE COURT: Oh, thank you.

24 MS. GODESKY: Thank you.  
25

1 BY MS. GODESKY:

2 Q. So the assignment clause, Mr. Carretta, reads, [REDACTED]

3 [REDACTED]

4 [REDACTED] and then it

5 goes on to say, [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 Do you see that?

9 A. I do.

10 Q. And there's no specific reference in this agreement to  
11 what you've characterized as standard language referencing  
12 mergers and acquisitions, correct?

13 A. Right. This is unusual language.

14 Q. Okay. Now you also talked about --

15 Vanessa, we can take that one down. Thank you.

16 You also talked during direct examination about  
17 what you called the commercial purpose of Section 10.8,  
18 right?

19 A. Right.

20 Q. And you said, we need to understand who we're doing  
21 business with. That was one reason you gave.

22 A. That is correct.

23 Q. And then you brought up indemnity concerns, and you  
24 talked about how you need to know if there's a new entity in  
25 town because you may have indemnity obligations you need to

1 know about, right?

2 A. Yeah, that was one concern. That's right.

3 Q. So you were explaining that was, that's the commercial  
4 purpose of these assignment clauses in FICO's contracts,  
5 right?

6 A. Well, the commercial purpose is to balance risk with  
7 reward. And indemnity risk is just that, it's a risk.

8 Q. Right. So the commercial purpose has to do with those  
9 two things I just described, right? You want to know who  
10 you're doing business with and this indemnity issue.

11 A. Right, among other possibilities. That's right.

12 Q. Now FICO enters Blaze license agreements that don't  
13 reflect any particular concerns about new entities using  
14 Blaze through mergers and acquisitions unless revenue  
15 exceeds a certain threshold, correct?

16 A. I don't recall that being a rule within FICO.

17 Q. Okay. Let's look at -- and we're not going to publish  
18 this to the jury just yet. This is Exhibit D4.

19 A. Okay. I'm there, yeah.

20 Q. And this is a September 30th, 2005, license agreement  
21 between FICO and a company called [REDACTED],  
22 correct?

23 A. That's correct.

24 Q. And if you look at page 11, you can see that this was  
25 signed by FICO and [REDACTED]

1 A. Yes.

2 MS. GODESKY: Defendants offer Exhibit D4 into  
3 evidence.

4 MR. HINDERAKER: No objection.

5 THE COURT: Subject to the same limitation, it's  
6 received.

7 BY MS. GODESKY:

8 Q. Okay. Mr. Carretta, let's go to page 10 where there's  
9 an assignment provision.

10 A. I see it. The numbering is a little blurred, but I do  
11 see it.

12 Q. I apologize. It look like it might be 10.8, but I'm not  
13 sure. It says, [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 Do you see that?

21 A. I do.

22 Q. Okay. So let's look at Section 3.2 on page 14.

23 A. I'm on page 14.

24 Q. Okay. And do you see the header saying Mergers and  
25 Acquisitions Involving Client?

1 A. I do.

2 Q. It says, [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 Do you see that?

18 A. I do see that.

19 Q. So this language, it does not appear in the Chubb  
20 license agreement, correct?

21 A. No. This was different. It was negotiated differently.

22 Q. And this is an example of an agreement where FICO's  
23 concerns about potentially negotiating more license fees and  
24 changing the scope of the agreement are only triggered if  
25 that merger or acquisition means that the new entity is a

1 particular threshold size, right?

2 A. That's right. They anticipated small things and didn't  
3 want to bother with them.

4 Q. We can take that one down. Thank you, Vanessa.

5 And then the other commercial purpose that you  
6 talked about on direct examination, Mr. Carretta, was the  
7 need for information so that you can price the software,  
8 correct?

9 A. I'm not sure I understand the context you are talking  
10 about. Are you talking about a new deal or --

11 Q. So I understood you to be saying during direct  
12 examination that one of the reasons this Section 10.8 clause  
13 exists, one of the commercial purposes, is so that you,  
14 FICO, can get information to price the software after a  
15 merger or acquisition.

16 A. Well, no, that's not entirely correct. It's a clause  
17 that says you can't not assign, right, is the first  
18 sentence, and I'm paraphrasing. And you need to acquire  
19 consent before you make one of the assignments or a transfer  
20 as defined or undefined.

21 Q. Mr. Carretta, I'm not asking you to interpret the  
22 language.

23 A. I'm not. I'm just playing back what it says.

24 Q. I just -- during direct examination you testified that  
25 one of the commercial purposes of Section 10.8 is so that

1 FICO can get information to properly price the software  
2 after a merger or acquisition.

3 Is that true in your mind?

4 A. I don't think that's what I testified to.

5 Q. But is that true in your mind? Is that one of the  
6 commercial reasons?

7 A. The commercial reason is to understand what is going to  
8 happen post the event, which may or may not involve price  
9 chain or may or may not involve an amendment. It could be a  
10 number of things.

11 Q. And one of the things that you had to understand after  
12 the event that was the ACE acquisition, was this issue of  
13 expanded use, right, that's referenced in the second  
14 sentence of Section 10.8 of the Chubb license agreement?

15 A. Right. There's an additional bit of language there.

16 Q. And you agree that the words on the page in Section 10.8  
17 of the Chubb contract state that FICO will not unreasonably  
18 withhold consent to even expanded use of Blaze, correct?

19 A. Let me look at the agreement, please.

20 Q. Sure. We can pull it up on the screen too.

21 A. That would be --

22 Q. It's in J1 at page 8.

23 A. -- helpful.

24 Q. If we could blow up Section 10.8, Vanessa? Thank you.

25 A. So if you wouldn't mind asking your question again.

1 Q. My question is whether you agree that the words on the  
2 page state, "that FICO cannot unreasonably withhold a  
3 consent to expanded use."

4 A. It's a non sequitur. The way its written it's comma and  
5 client shall make no expanded use, which grammatically means  
6 it's a covenant. It's a separate, independent term of the  
7 sentence. And client shall make no expanded use as a result  
8 of, unless and until, they receive such consent. So I don't  
9 agree with you.

10 Q. Even under your understanding of this agreement, if  
11 Chubb were to ask FICO for consent after a merger or  
12 acquisition, this agreement says that FICO will not  
13 unreasonably withhold that consent, correct?

14 A. No, that's not correct.

15 Q. Okay. Well, let's go look at P90. This is your first  
16 letter to Chubb asserting breach concerns after the ACE  
17 acquisition.

18 A. Okay.

19 Q. So in P90, I want to go to the second page and look at  
20 the first full paragraph.

21 You wrote, and this is January 2016, right,  
22 Mr. Carretta?

23 A. January 27, 2016.

24 Q. This is your first letter to Chubb, right?

25 A. The very first one. That is right.



1 Q. And you wrote, "FICO lacks sufficient information to  
2 understand the full implications of Chubb Limited's plans  
3 and without some shared insight is unable to accommodate any  
4 request now for consent."

5 Do you see that?

6 A. I do.

7 Q. And you said during direct examination, we didn't know  
8 what they were planning to do with the software, right?

9 A. Right, because they didn't ask before they closed. They  
10 closed, and then we only had the information that we, we  
11 could gather, and that's why we're asking them.

12 Q. Mr. Carretta, I'm going to, to keep moving this along,  
13 I'm just going to ask you to answer my question. Okay?

14 A. Okay.

15 Q. I want to show you Mr. Hopp's response to your letter,  
16 which is in evidence as P91.

17 A. Yes.

18 Q. And this was sent on February 17th, 2016, correct?

19 A. That's correct.

20 Q. And if we look at the second paragraph -- and blow that  
21 up Vanessa. Thank you.

22 Mr. Hopp wrote, "While we continue to evaluate our  
23 use and means, our initial findings indicate that the  
24 applications that have been using Blaze Advisor software  
25 since 2006 are currently running in the exact same fashion

1 as prior to the merger transaction.

2 "Please be advised that our IT software compliance  
3 department has been fully engaged to oversee this evaluation  
4 process carefully and is committed to working with FICO to  
5 gather the necessary information to understand the full  
6 implication of our plans moving forward and to determine  
7 Chubb & Son's future licensing needs."

8 Do you see that?

9 A. I do.

10 Q. And this was a direct response to the concerns that you  
11 had raised in your January letter wondering what Chubb  
12 Limited's plans were going to be, correct?

13 A. Yes, I think that's probably correct.

14 Q. And this is a direct assurance from Chubb that Blaze use  
15 has not expanded by virtue of the ACE acquisition, correct?

16 A. No, because Andrew ignored the fact that the event  
17 occurred, and therefore it was already a breach.

18 Q. I'm not asking about whether there was already a breach  
19 or when in your mind Chubb had to ask for consent. I'm not  
20 asking about that.

21 My question is whether it's true that as far as  
22 questions of expanded use are concerned, this was a direct  
23 assurance from Chubb in response to your inquiry that Blaze  
24 use had not expanded by virtue of the ACE acquisition.

25 A. I disagree.

1 Q. Now, FICO had agreed when it signed the 2006 agreement  
2 to explore any questions of expanded use in good faith,  
3 correct?

4 A. I'm sorry. Could you repeat that?

5 Q. When FICO signed the license agreement in 2006, it  
6 agreed that it was going to explore any questions of  
7 expanded use in good faith, correct?

8 A. I think it's an implied covenant of good faith and fair  
9 dealing for both parties, so yes.

10 Q. And as to Mr. Hopp's statement in response to your  
11 letter where he says, "Applications that have been using the  
12 Blaze Advisor software are running in the exact same  
13 fashion," you had no evidence as of February 17th, when you  
14 received this letter, suggesting that that statement was  
15 false, correct?

16 A. The problem is, it's innocuous. I don't know what  
17 "currently running" means.

18 THE COURT: Mr. Carretta, you need to answer the  
19 question that she asked you.

20 THE WITNESS: Okay. Go ahead. Please ask again.

21 BY MS. GODESKY:

22 Q. As far as Mr. Hopp's statement in his response to you  
23 that the applications that had been using Blaze Advisor  
24 software since 2006 are running in the exact same fashion,  
25 you had no evidence as of February 17th when you received

1 this letter suggesting that was false, correct?

2 A. We didn't have any information.

3 Q. You had no evidence suggesting it was false, correct?

4 A. Yes, that's what I'm saying.

5 Q. And the information that Mr. Hopp provided you and told  
6 you that his compliance department was fully engaged was,  
7 applications are currently running in the exact same  
8 fashion. That is information, isn't it?

9 A. That's what he's telling us.

10 Q. You had no evidence as of February 17th, when you  
11 received this letter, suggesting that the number of  
12 applications using Blaze at Chubb had changed, correct?

13 A. We didn't know.

14 Q. You had no evidence, right, Mr. Carretta?

15 A. Right.

16 Q. And you had no evidence that Blaze had been inserted  
17 into Legacy ACE computer applications, right? You hadn't  
18 seen anything suggesting that had happened.

19 A. No.

20 Q. Now, I want to look at another communication from Chubb  
21 a few days later on February 25th, 2016.

22 This is already in evidence as P94.

23 A. Okay.

24 Q. And this is an email that Tamra Pawloski at Chubb sent  
25 to Mr. Sawyer and Mr. Schreiber, and this is dated

1 February 25th, 2016. So this would be a few days after  
2 Mr. Hopp sent you his letter, right?

3 A. Yes.

4 Q. And if you look at Ms. Pawloski's email she says Mike  
5 and Russ, I know my GC -- that's general counsel, right?

6 A. That's correct.

7 Q. Reached out to you -- sorry?

8 A. I assume that's what he means.

9 Q. Okay. "I know my GC reached out to yours but got an out  
10 of office due to illness. I wanted to share with you that  
11 his communication was for us to work through a commercial  
12 proposal. I have attached that for your review and comment.  
13 I am pretty open tomorrow if you'd like to discuss."

14 Do you see that?

15 A. I do.

16 Q. And then if you turn to the second page of the document  
17 it says, "FICO proposal of February 25th, 2016," correct?

18 A. Yes. There's a proposal attached that says that date.

19 Q. Okay. And so Ms. Pawloski's proposal says, "Although  
20 Chubb strongly disagrees with FICO's stated position, in a  
21 good faith effort to move the relationship forward, Chubb  
22 proposes that the parties renegotiate Chubb's currently  
23 perpetual application-based enterprise license to downgrade  
24 and limit Blaze Advisor development and deployment to  
25 reflect Chubb's actual usage of 15 named applications of

1 Blaze Advisor deployment and 100 seats of Blaze Advisor" --  
2 sorry. I misread something -- "actual usage of 15 named  
3 applications of Blaze Advisor deployment, 100 seats of Blaze  
4 Advisor development at no additional cost to Chubb."

5 Do you see that?

6 A. Yes.

7 Q. So this was an offer from Chubb to switch from a  
8 perpetual license with no limit on the number of  
9 applications to a license that would have limited Chubb to  
10 using Blaze in 15 applications, correct? That's what she's  
11 suggesting.

12 A. That's correct. I'm not sure which Chubb, but, yes,  
13 that's what she's suggesting.

14 Q. And she's also agreeing to limit the number of seats,  
15 right? Chubb had paid for an enterprise-wide license with  
16 no limit on the number of seats, but she's saying we'll  
17 limit it to current use, 100 seats. That's what she's  
18 saying, right?

19 A. That's what she's saying.

20 Q. And if we go on to the next sentence, Mr. Carretta, it  
21 says, "All usage now and going forward does not and will not  
22 change from that permitted under the current license  
23 agreement, And all usage remains with the same named  
24 applications," correct?

25 A. That's correct.

1 Q. That sounds like a commitment not to expand use to new  
2 applications or new people, correct?

3 A. I'm not sure I agree with you on that.

4 Q. It's a commitment by Ms. Pawloski in this commercial  
5 proposal not to expand beyond the 15 applications that are  
6 currently using currently using Blaze, correct?

7 A. I'm sorry. I wasn't part of this, so I'm just reading  
8 it now.

9 Q. But that's how it reads, right?

10 A. It reads what it reads.

11 Q. And it also reads that she's making a commitment not to  
12 expand to more people, correct?

13 A. That's what it says.

14 Q. And then in the last sentence of this paragraph  
15 Ms. Pawloski wrote, "Under this proposal, Chubb will  
16 continue to pay for maintenance at the current cost of  
17 \$237,000 per year in accordance with the terms of the  
18 parties' current agreement." Do you see this?

19 A. I do.

20 Q. No one at FICO even showed you this proposal from  
21 Ms. Pawloski before you sent your letter purporting to  
22 terminate the license agreement, correct?

23 A. That is correct.

24 Q. It wasn't passed on to you by Mr. Sawyer or  
25 Mr. Schreiber, who received it from Ms. Pawloski.

1 A. No, it was not passed on to me.

2 Q. They knew that you were going to purport to terminate  
3 the license agreement effective March 2016, but they never  
4 passed this on to you, correct?

5 A. No, I don't know that.

6 Q. The first time you saw this proposal from Ms. Pawloski  
7 was during your deposition in this litigation, correct?

8 A. That is correct. I misspoke earlier. You are correct.

9 Q. Now, you sent that letter on March 30th, 2016, saying  
10 I'm terminating the Blaze license agreement effective the  
11 next day, March 31st, correct?

12 A. Yes.

13 Q. And that was based on the allegedly newly discovered use  
14 of Blaze in Europe right?

15 A. One of the reasons.

16 Q. And then you also had the reason of the DWS and  
17 AppCentrica issues you found on the maintenance logs,  
18 correct?

19 A. Yes.

20 Q. And then of course this issue with Section 10.8, right?

21 A. Yes.

22 Q. Now, as of March 30th, 2016, when you said you were  
23 terminating the license agreement, you had no evidence that  
24 Chubb had increased the number of computer applications  
25 running Blaze, correct?



1 A. I think that's correct.

2 Q. And you --

3 A. I did not.

4 Q. And you had no evidence that Blaze had been added to any  
5 computer applications at ACE, correct?

6 A. I did not.

7 Q. And you had no evidence that the number of people using  
8 the Blaze software at Chubb had increased, correct?

9 A. I didn't. Correct. Sorry.

10 Q. Thank you.

11 MS. GODESKY: I have no further questions. Thank  
12 you.

13 THE COURT: Thank you, Ms. Godesky.

14 MR. Hinderaker, redirect.

15 MR. HINDERAKER: Please. I think we have some  
16 binders coming up.

17 Thank you.

18 THE WITNESS: Thank you.

19 MR. HINDERAKER: Yes.

20 REDIRECT EXAMINATION

21 BY MR. HINDERAKER:

22 Q. Well, let's find my notes, and we'll try to start at the  
23 beginning here.

24 You were asked about this notion of whether  
25 Chubb & Son is a legal entity or not. And if you would turn

1 to the Exhibit P91, please. And this is Mr. Hopp's letter  
2 to you of February 17, 2016? Agreed?

3 A. Agreed.

4 Q. And let's look at the first paragraph where we didn't  
5 spend time with before.

6 Is Mr. Hopp telling you, "Notwithstanding the  
7 acquisition, Chubb & Son, the contracting party to the  
8 agreement, remains a viable legal entity within the Chubb  
9 Group of Insurance Companies corporate structure and the  
10 contracting party to this agreement"?

11 A. That's what it says.

12 Q. That's what he says.

13 Maybe I need this again.

14 Let's go to J1. And I want to spend just a few  
15 moments with this.

16 The original agreement, as you look at it, is  
17 dated June 30, 2006. And we go to the signature page on  
18 page 9 of J001, page 9, and our signature block is client  
19 Chubb & Son?

20 A. That's correct.

21 Q. Okay. And now let's move forward. So we get to  
22 Exhibit A of the original agreement. And under the column  
23 Scope and Quantity, you see that it says Named Application?

24 A. Yes.

25 Q. And then under the table at subpart a, it names what the

1 application is.

2 A. That's correct.

3 Q. Okay. And in the terminology, it's fair to call this a  
4 named application license?

5 A. Yes. That's correct.

6 Q. Then let's go to Amendment Number One. And if we go to  
7 the signature page of that.

8 A. Okay.

9 Q. All right. The client is Chubb & Son, and it signs on  
10 July 21st, and Fair Isaac Corporation signs on August 1st,  
11 right?

12 A. Yes. That is correct.

13 Q. All right. And let's go back a page to the Scope and  
14 Quantity under Amendment Number One.

15 And for Deployment, "For use solely by the Chubb  
16 specialty division, no other limitations, i.e., seat or  
17 named applications limitations apply."

18 A. Yes.

19 Q. Okay. Amendment One is an expansion of rights, an  
20 expansion of FICO's permission to Chubb & Son regarding the  
21 scope of use of Blaze Advisor. Agreed?

22 A. Agreed.

23 Q. And then let's -- so we go from a named application, and  
24 this Amendment One is called a divisional license in your  
25 terminology.

1 A. That's correct.

2 Q. And the client still is Chubb & Son who has the rights  
3 to use the software within that division?

4 A. That's correct.

5 Q. And then let's go to Amendment Two. If we go to the  
6 signature page, the client Chubb & Son, a division of  
7 Federal Insurance?

8 A. Correct.

9 Q. It's signs December 27th, and FICO signs December 28th,  
10 right?

11 A. That is correct.

12 Q. And then we go to the Scope and Quantity column on the  
13 page before.

14 A. I see that.

15 Q. All right. And you see that the scope and quantity is  
16 now described as enterprise-wide.

17 A. That's correct.

18 Q. Okay. Whose enterprise are we talking about?

19 A. The enterprise-wide license optional.

20 Q. Understood. And the client is?

21 A. Chubb & Son.

22 Q. The division?

23 A. A division of Federal Insurance.

24 Q. And is -- so we've gone from an expansion of rights to a  
25 named application to a division. And is this another

1 expansion of rights to the client Chubb & Son from  
2 divisional use to the enterprise of Chubb & Son?

3 A. Yes.

4 Q. Now in this Amendment Two, you were asked some questions  
5 about the first full paragraph on the top of the second  
6 page. I'll get over there please. There we go.

7 For the purposes of this amendment, the enterprise  
8 license shall mean that client. Client is Chubb & Son, the  
9 division?

10 A. That's correct.

11 Q. And its affiliates may use the Fair Isaac product. So  
12 far with me?

13 A. Yes.

14 Q. And then, then it defines affiliates shall mean any  
15 entity directly or indirectly controlled by client. And  
16 then further defines that as having more than 50 percent of  
17 the aggregate stock of ownership.

18 A. That's right.

19 Q. In your examination or questioning by Ms. Godesky, she  
20 says that Chubb & Son, the division, has no affiliates.

21 A. Yes, I recall that.

22 Q. Okay. And is that the license agreement and the  
23 definition of affiliates that Chubb & Son signed?

24 A. Yes, right here. The one that's on my screen.

25 Q. That's right. That's the agreement that the two parties

1 entered into?

2 A. That's correct.

3 Q. Let me not hit this mic again.

4 Let's go to -- you were asked some questions about  
5 your termination letter, 103. Plaintiff's Exhibit 0103.

6 And keep the license agreement nearby as well. In fact --

7 A. Okay.

8 Q. -- on a reference, your termination letter, because in  
9 the termination letter you speak of the two applications  
10 outside the United States and then in Canada. I guess  
11 three?

12 A. Yes.

13 Q. Would you go to the license agreement J001?

14 A. Okay.

15 Q. And if we could go to the seventh page, please.

16 A. Okay.

17 Q. The license agreement does include a provision 10.5 that  
18 says Entire Agreement?

19 A. That is correct.

20 Q. It says it supercedes all prior or contemporaneous  
21 proposals, and all other oral or written understandings,  
22 representations, conditions and other communications between  
23 the parties.

24 Agreed?

25 A. Agreed.

1 Q. It goes on to say that, "Each party represents and  
2 warrants to the other party that entering into this  
3 agreement it does not rely on any representation, promises  
4 or assurances from any other party or employee," and so  
5 forth.

6 And then it ends with the sentence, "Any other  
7 terms or conditions or amendments shall not be incorporated  
8 herein or be binding upon any party, unless expressly agreed  
9 to in a writing signed by authorized representatives of  
10 client and Fair Isaac."

11 Agreed?

12 A. Yes.

13 Q. And then the license agreement also has a provision  
14 called 10.4, No Waiver.

15 A. Yes.

16 Q. And that provision ends, "No waiver of any rights of a  
17 party under this agreement will be effective unless set  
18 forth in a writing signed by the parties."

19 Agreed?

20 A. Agreed.

21 Q. Now at Fair Isaac, as a matter of fact, does Fair Isaac  
22 have a policy that identifies those persons who have the  
23 ability to enter into an agreement on behalf of FICO?

24 A. Yes.

25 Q. Do salesmen like Mr. Sawyer or Mr. Schreiber have the

1 authority under that written policy to enter into agreements  
2 on behalf of FICO?

3 MS. GODESKY: Objection.

4 THE COURT: Overruled.

5 THE WITNESS: No, they do not.

6 BY MR. HINDERAKER:

7 Q. You were asked some questions about consultants, third  
8 party. And you made the statement that the, the prohibition  
9 is absolute. The magnitude does not matter.

10 What did you mean by that?

11 A. Essentially the slightest infraction is a breach. That  
12 it effectively defines materiality. Lawyers sometimes call  
13 it strict liability.

14 Q. Okay. Let's go to the license agreement again and  
15 paragraph 3.6.

16 A. Okay.

17 Q. Why don't you review it briefly so that you can get some  
18 context.

19 A. Okay.

20 Q. All right. And here in paragraph 3.6, FICO and Chubb &  
21 Son have agreed that one consultant, ACS Commercial  
22 Solutions, has the right to use Blaze Advisor software.

23 Do you see that?

24 A. That's correct.

25 Q. And in fact paragraph 3.6 expressly says, does it not,



1 that ACS Commercial Solutions is the information technology  
2 infrastructure operations outsourced to ACS Commercial  
3 Solutions?

4 A. That's correct.

5 Q. That's to say, ACS Commercial Solutions is going to be  
6 using Blaze Advisor for the benefit of Chubb & Son, the  
7 division?

8 A. That's correct.

9 Q. But to get that permission, it was negotiations of  
10 paragraph 3.6?

11 A. Yes.

12 Q. And 3.6 further says, "Provided that such use is  
13 otherwise subject to the terms and conditions of this  
14 agreement and does not exceed the limitations and use for  
15 other restrictions set forth herein." Correct?

16 A. Yes. That's correct.

17 Q. And it further says, "Client shall responsible," client  
18 Chubb & Son, "shall be responsible for assuring ACS's  
19 compliance with the terms and conditions of this agreement."

20 Agreed? That's what it says?"

21 A. Yes.

22 Q. "And client shall be liable to Fair Isaac for any breach  
23 of the agreement by ACS." It says that?

24 A. Yes.

25 Q. "The rights granted to ACS herein shall not be extended

1 to any other third party without the prior written consent  
2 of Fair Isaac."

3 A. That's correct.

4 Q. And if we went to paragraph 3.1, this contains a variety  
5 of client representations and warrants that its employees  
6 shall not under the heading License Restrictions?

7 A. Yes, I see that.

8 Q. An unauthorized third party using Blaze Advisor is not  
9 subject to any of these restrictions, is it?

10 A. I'm not sure I understand your question.

11 Q. If a third-party consultant is using Blaze Advisor  
12 without FICO's permission, that third-party consultant isn't  
13 subject to any other restrictions of the license agreement,  
14 correct?

15 A. That's correct.

16 Q. You were shown, you were shown some emails from Sawyer  
17 and Moffat, maybe, and they were dated January 8, 2016.

18 So let's be clear. Those are before your notice  
19 of breach letter of January 27th.

20 A. That's correct.

21 Q. And in the third paragraph you say, "I am writing now to  
22 again confirm." And that "again" reference, the fact that  
23 Sawyer had finally had gotten in contact with the client by  
24 January about 10.8, as you say, "I am writing now to again  
25 confirm"?

1 A. That's right.

2 Q. When you were asked questions about 10.8, you said the  
3 first sentence and the second sentence are your words were,  
4 "Independent restrictions."

5 A. That's correct.

6 Q. Why did you say that?

7 A. Because that's the way it was designed.

8 Q. Okay. But what -- can you --

9 A. Why did I say that?

10 Q. Can you help us with that?

11 A. Sure. Because the first sentence which we have seen in  
12 a number of these agreements, notwithstanding they're  
13 negotiated in a little different -- is neither party without  
14 the prior written consent of the other party, neither party  
15 shall without the written consent of the other party, assign  
16 or transfer this agreement or any part thereof.

17 So that's the absolute rule, the first rule.

18 MS. GODESKY: Objection, Your Honor.

19 THE COURT: Overruled.

20 THE WITNESS: Okay.

21 BY MR. HINDERAKER:

22 Q. Okay. That's one restriction. What's the other  
23 independent restriction?

24 A. The second restriction was designed to address mergers  
25 and acquisitions and what happens in those circumstances

1 where there's a laundry list of these various kinds of ways  
2 to get mergers done and acquisitions done, where each such  
3 event shall be deemed it to be an assignment subject to this  
4 section, which is 10.8. And then it goes on.

5 Q. Understood. You were shown a couple license agreements.

6 A. Correct.

7 Q. And I'm going to show you a couple more. And if you  
8 would go to -- let's find the exhibit that's D282.

9 This is a license agreement between FICO and [REDACTED]  
10 [REDACTED], dated June 30, 2006; is that correct?

11 A. Sorry. I was in the wrong book.

12 Q. Yeah. Yeah. It's the one called your name on it  
13 redirect.

14 A. Yes, I have it. [REDACTED].

15 MR. HINDERAKER: Your Honor, I move Exhibit D0282.

16 MS. GODESKY: No objection.

17 THE COURT: D0282 is accepted.

18 BY MR. HINDERAKER:

19 Q. Would you turn to paragraph 8.3, which is called No  
20 Assignment?

21 A. Correct.

22 Q. Can you tell us looking at paragraph 8.3 of this exhibit  
23 how it compares to 10.8 of the license agreement with Chubb  
24 & Son?

25 A. I think it's identical, the first sentence certainly is,

1 if I check it. Sorry.

2 They're not quite identical, because it has the  
3 words [REDACTED].

4 Q. All right. So this one says such -- the Exhibit D0282,  
5 [REDACTED], everything is the same except it says,

6 [REDACTED]

7 [REDACTED]

8 A. That is correct.

9 Q. That's the difference?

10 A. That's the difference.

11 Q. With the exceptions of that difference, everything in,  
12 everything else in 8.3 of the [REDACTED] agreement is the  
13 same as 10.8 of the Chubb & Son's agreement. Do you agree?

14 A. Yes.

15 Q. Okay. Why don't you pull out the D0017 from that same  
16 binder.

17 A. Okay.

18 Q. This one is with [REDACTED]

19 A. That is correct.

20 Q. This is dated May 23, 2006?

21 A. That is correct.

22 Q. I think the other was dated May -- no. It was dated  
23 June 30, 2006.

24 A. Yes.

25 Q. So on the [REDACTED] agreement, why don't we look at

1 paragraph 12.8.

2 THE COURT: Will you be offering D17?

3 MR. HINDERAKER: I will, yes. I should. Thank  
4 you.

5 Your Honor, I offer D17.

6 MS. GODESKY: No objection.

7 THE COURT: D17 is received.

8 BY MR. HINDERAKER:

9 Q. And now we can turn to paragraph 12.8.

10 A. Okay.

11 Q. And this is also entitled, No Assignment?

12 A. Correct.

13 Q. And could you do the same comparison for me, whether  
14 there's any difference in the [REDACTED] 12.8 to the Chubb & Son  
15 10.8?

16 A. Excuse me. This doesn't have the language at the --  
17 following the last comma which says "will not be  
18 unreasonably withheld" that's in the Chubb & Son agreement.

19 Q. So with the [REDACTED], the "shall not be unreasonably  
20 withheld" element that's in the Chubb & Son agreement is not  
21 present in the [REDACTED] agreement.

22 A. No, it is not.

23 Q. From your experience, can you -- are there indicia that  
24 tell you whether a license agreement is, say, heavily  
25 negotiated or lightly negotiated? Can you discern the

1 difference?

2 A. Sure. I mean, the ones that are based on our template,  
3 you can do line-by-line comparisons using a tool like Word.  
4 Others are on the customer's paper and are therefore  
5 radically different.

6 Q. By definition?

7 A. By definition.

8 Q. And the two agreements that I just showed you, those are  
9 both on basic paper, as FICO paper?

10 A. Yes.

11 Q. And did you notice whether the license agreements that  
12 Ms. Godesky showed you, were they basic paper, was the basic  
13 paper on those FICO as well?

14 A. Yeah. They definitely started with FICO paper or  
15 template.

16 Q. And is it fair to say that in those other agreements  
17 they were simply more heavily negotiated?

18 A. Yes. Each one is different.

19 Q. You were, you were asked a question by Ms. Godesky about  
20 the second sentence of paragraph 10.8 and the, and then the,  
21 "And client shall make no expanded use."

22 And you used the phrase from her examination to  
23 you, "Well, that's a non sequitur."

24 Do you recall that?

25 A. Yes.

1 Q. What did you mean by that?

2 A. Each of them are different restrictions, and so they all  
3 work together, but they're different, independent from each  
4 other.

5 Q. And so what was the non sequitur nature of the question  
6 then?

7 A. Well, if I remember correctly, there's an event, comma,  
8 "Client shall make no expanded use as a result," that's  
9 driving towards maintaining the status quo. Don't do  
10 anything different today from what you were doing before  
11 while we're in this period that we provided to them.

12 Q. That period being the 30-day period?

13 A. Yes.

14 Q. So nothing different during the 30-day period than what  
15 you did before?

16 A. That is right.

17 Q. Okay.

18 MS. GODESKY: Objection, Your Honor.

19 THE COURT: Sustained.

20 BY MR. HINDERAKER:

21 Q. That's why you said it was a non sequitur.

22 A. Right.

23 MS. GODESKY: Objection.

24 THE COURT: Sustained.

25



1 BY MR. HINDERAKER:

2 Q. You were asked whether FICO had an obligation to explore  
3 whether Chubb & Son had expanded its use in that 30-day  
4 period. Do you recall that?

5 A. Yes.

6 Q. Did FICO have such an obligation?

7 A. No.

8 Q. You've told us, of course, that you were not included in  
9 the communications of the commercial proposal of Exhibit 94.  
10 Nevertheless, you were asked about it. You were asked about  
11 what you saw just from the reading of it.

12 As you read Exhibit 94, is there any limitation on  
13 the -- is there any limitation on the future use of Blaze  
14 Advisor with respect to running more volume through the  
15 applications?

16 A. There's no reference to that.

17 Q. Does it also say that -- I'm sorry. I think it's in the  
18 next paragraph down.

19 And it also says, "Chubb shall have the right to  
20 change the applications utilizing the Blaze Advisor software  
21 at any time and in its sole discretion without FICO's  
22 consent so long as the named applications do not exceed an  
23 amount of 15."

24 Also says that?

25 A. I see that. I see that.

1 Q. And so is it in your -- is it a non sequitur to consider  
2 this proposal, this commercial proposal, as having any  
3 change to your notice of breach letter?

4 A. Yes.

5 Q. What?

6 A. Yes.

7 Q. What is it?

8 A. This is just a whole different way, this is a whole new  
9 deal, and that looks like expanded use to me. It looks like  
10 they're changing the way that they want to go about doing  
11 things.

12 Q. And then if I can just bring your attention to  
13 Exhibit 96. This is before your notice of termination  
14 letter of March 30th. In fact, on February 26, 2016, you  
15 did communicate to Mr. Hopp that -- I got the wrong Exhibit  
16 Number 95.

17 On February 26, 2015, you did communicate to  
18 Mr. Hopp, "The proposal was not acceptable from our business  
19 and compliance teams, and I confirm it is rejected."

20 A. That's correct.

21 MR. HINDERAKER: I have no further questions, Your  
22 Honor.

23 THE COURT: Thank you, Mr. Hinderaker.

24 Ms. Godesky, any recross?

25 MS. GODESKY: No. Thank you.

1 THE COURT: All right. Thank you, Mr. Carretta.  
2 You may be excused.

3 THE WITNESS: Thank you.

4 THE COURT: All right. It's 10 to 5:00. So we'll  
5 take our break for the weekend.

6 It seems like it's only Monday today for some  
7 reason. I'm not sure why.

8 Remember. No investigation, no research, no  
9 talking to others about the case. Okay?

10 All right. Enjoy your second weekend of this  
11 week.

12 THE CLERK: All rise for the jury.

13 **IN OPEN COURT**

14 **(JURY NOT PRESENT)**

15 THE COURT: Go ahead and be seated. We don't have  
16 to be on the record for this.

17 (Off the record discussion)

18 MS. GODESKY: So your comment about an instruction  
19 on attorney witnesses relates to a concern I have about  
20 Mr. Carretta's testimony. I mean, it's no secret it's on  
21 the record. Objections were lodged repeatedly. And I think  
22 this witness skirted the rules many times in terms of  
23 talking about his interpretations of the agreements.

24 And what he did at the end of his testimony was  
25 exactly what we had tried to prevent with our motion in

1       limine. I mean, we moved in limine and highlighted the fact  
2       that Mr. Carretta was instructed at his deposition not to  
3       talk about his understanding of expanded use and what that  
4       looks like and how he would interpret it. The court granted  
5       the motion, was my understanding, with regard to the  
6       sword-shield issue.

7               And then at the end of his testimony Mr. Carretta  
8       testifies he looks at Ms. Pawloski's proposal and he says,  
9       This is a whole new deal and that looks like expanded use to  
10      me. It looks like they're changing the way they want to go  
11      about doing things. And that is exactly the testimony that  
12      we tried to explore at deposition and they instructed him  
13      not to answer and asserted privilege. And that's in his  
14      deposition transcripts at page 151 and again earlier at  
15      page 150.

16             And so I think there absolutely needs to be a  
17      curative instruction, but I think it needs to go beyond what  
18      Your Honor was just suggesting and specifically comment on  
19      the fact that Mr. Carretta cannot be opining on the content  
20      of, you know, how you interpret expanded use.

21             THE COURT: Understood. Why don't you submit  
22      those pages of the deposition.

23             I think the instruction that I have drafted and  
24      intend to give will cure this and other issues without the  
25      need of commenting specifically on specific items of

1 testimony, but submit the depo pages -- if you really need  
2 to submit letters, you guys can -- and I'll consider it.  
3 That question and answer were concerning to me as well.  
4 However, it was given in the context of I think this is a  
5 proposal for expanded use. It wasn't tied -- I know the  
6 language is the same, but it wasn't tied to, I think this is  
7 expanded use under the contract or this is beyond what the  
8 contract means. So, I know, we're -- it's -- drawing this  
9 line is treacherous, but I'll take a look at that issue.

10 Mr. Hinderaker, you are welcome to respond.

11 MR. HINDERAKER: I get antsy. And I was aware of  
12 the court's guidance, of course, and these questions came up  
13 on redirect, and they came up on redirect because of the  
14 questions that were on cross rather than let the unfairness  
15 of not answering.

16 So like Ms. Godesky's question was, quote, "My  
17 question is whether you agree that the words on the page  
18 that FICO cannot unreasonably withhold a consent to expand  
19 use.

20 "Answer: That's a non sequitur. The way it's  
21 written it's, comma, and client shall make no expanded use,  
22 which grammatically means it's a covenant. It's a separate  
23 independent term of the sentence, and the client should make  
24 no expanded use as a result of unless and until they receive  
25 such consent. So I don't agree with you.

1           "Question: Even under your understanding of this  
2 agreement if Chubb were to ask FICO for consent after a  
3 merger or acquisition, this agreement says that FICO will  
4 not unreasonably withhold that on consent, correct?

5           "No, that's not correct."

6           If those questions aren't directed to the  
7 attorney's, lawyer's understanding of the license agreement,  
8 then nothing is.

9           And my follow-up was simply, "To be clear, what  
10 did you mean by the non sequitur?" So I walked through a  
11 door that was opened up, in my humble view. Thank you.

12          THE COURT: I understand.

13          And I think the, the testimony at the very end of  
14 Mr. Carretta's redirect relating to the commercial proposal  
15 as expanded use I think is separate from that. I think the  
16 answer that Mr. Carretta initially gave as to expanded use  
17 was -- or as to non sequitur, was adequately explained as to  
18 the grammatical usage that he was trying to indicate, but I  
19 thought the questions beyond that went into interpretation  
20 of the contract. But go ahead and submit what you want me  
21 to look at. You do the same.

22          All right. We have those. So it's pages 50 and  
23 51 or 150 and 151?

24          MS. GODESKY: 150 and 151.

25          THE COURT: Okay. Well, you can each on this one

1 file a two-page letter, if you need to.

2 My intention is to give, regardless of this  
3 particular issue, I will be giving an instruction about  
4 lawyer testimony. And I do think that it will take care of  
5 concerns about this topic in general, but we'll see.

6 MS. GODESKY: Thank you.

7 THE COURT: Anything further, Mr. Godesky?

8 MS. GODESKY: No thank you.

9 THE COURT: Anything further, Mr. Hinderaker?

10 MR. HINDERAKER: No, Your Honor.

11 THE COURT: Okay. Thanks, everyone. Enjoy your  
12 weekends.

13 (Court adjourned at 5:00 p.m., 02-24-2023.)  
14

15 We, Kristine Mousseau and Renee A. Rogge, certify  
16 that the foregoing is a correct transcript from the record  
17 of proceedings in the above-entitled matter.  
18

19 Certified by: /s/Kristine Mousseau  
20 Kristine Mousseau, CRR-RPR  
21 /s/Renee A. Rogge  
22 Renee A. Rogge, RMR-CRR  
23  
24  
25